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Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM BARNES, *et al.*
Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC., *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDICES E-H

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM BARNES, et al	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
THE AMERICAN TOBACCO COMPANY, INC., et al.	:	NO. 96-5903
	:	

ORDER

AND NOW, this 17th day of October, 1977, upon consideration of the following Motions, and any responses thereto, and any replies thereto, it is hereby ORDERED that:

1. Defendant's Motion for summary Judgment concerning Plaintiff's contributory Negligence, Assumption of Risk and Consent to Exposure to Hazardous Substances is DENIED;

2. Defendants' Motion for Summary Judgment Based on the Statute of Limitations is GRANTED in part and DENIED in part. The Motion is granted to the extent that defendants' seek summary judgment against William Barnes, Catherine Potts, Norma Rodweller, Barbra Salzman and Edward Slivak; the Motion is denied to the extent that defendants seek summary judgment against Ciaran McNally. IT IS FURTHER ORDERED that JUDGMENT is ENTERED against William Barnes, Catherine Potts, Norma Rodweller, Barbra Salzman and Edward Slivak and in favor of defendants; and

3. Defendants' Motion for Summary Judgment concerning Plaintiffs' Claims for Medical Monitoring is GRANTED

in part and DENIED in part. The Motion is granted to the extent that defendants seek summary judgment against Ciaran McNally, and the motion is denied as moot in all other respects. IT IS FURTHER ORDERED that JUDGMENT is ENTERED against Ciaran McNally and in favor of defendants.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.

William BARNES, et al.

v.

The AMERICAN TOBACCO COMPANY, INC., et al.

No. CIV. A. 96-5903.

United States District Court,
E.D. Pennsylvania.

Oct. 17, 1997.

Stephen A. Sheller, Sheller, Ludwig & Badey, Philadelphia, PA, Thomas E. Mellon Jr., Mellon, Webster & Mellon, Doylestown, PA, Arnold Levin, Jonathan Shub, Levin, Fishbein, Sedran & Berman, Philadelphia, PA, Sherrice A. Knisely, Sheller, Ludwig and Badey, Philadelphia, PA, Julia W. McInerny, Coale and Van Susteren, Washington, DC, Gary Robert Fine, Rodham and Fine, P.A., Fort Lauderdale, FL, Dianne M. Nast, Mary Ann M. Cooke, Roda and Nast, P.C., Lancaster, PA, Clifford E. Douglas, Evanston, IL, for Steven R. Arch, William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman, Edward J. Slivak, John Teagle.

Edward F. Mannino, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, PA, Peter S. Greenberg, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, for American Tobacco Company Inc.

Edward F. Mannino, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, PA, for American Brands, Inc.

Hugh R. Whiting, Jones, Day, Reavis & Pogue, Cleveland, OH, Gerhard P. Dietrich, Morton F. Daller, Tracy Canuso Nugent, Daller Greenberg and Dietrich, Fort Washington, PA, for R.J. Reynolds Tobacco Company.

Morton F. Daller, Tracy Canuso Nugent, Daller Greenberg and Dietrich, Fort Washington, PA, for RJR Nabisco, Inc.

Edward F. Mannino, James Lewis Griffith, Virginia Lynn Hogben, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, PA, Peter S. Greenberg, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, Gerhard P. Dietrich, Daller Greenberg & Dietrich, Fort Washington, PA, for Brown & Williamson Tobacco Corporation.

Peter S. Greenberg, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, Virginia Lynn Hogben, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, PA, for Batus Inc., Batus Holdings, Inc.

Judy L. Leone, Dechert, Price & Rhoads, Philadelphia, PA, Thomas Finarelli, Lavin, Coleman, O'Neil, Ricci, Finarelli & Gray, Philadelphia, PA, for B.A.T. Industries P.L.C.,

Judy L. Leone, Robert C. Heim, Christine C. Levin, Ronni Ellen Fuchs, Dechert, Price & Rhoads, Philadelphia, PA, Gerhard P. Dietrich, Daller Greenberg & Dietrich, Fort Washington, PA, for Philip Morris, Inc.

Judy L. Leone, Robert C. Heim, Christine Levin, Dechert, Price & Rhoads, Philadelphia, PA, for Philip Morris Companies, Inc.

Howard M. Klein, William J. O'Brien, Conrad, O'Brien, Gellman & Rohn, P.C., Philadelphia, PA, Edward A. Greenberg, Gerhard P. Dietrich, Daller Greenberg & Dietrich, Fort Washington, PA, for Lorillard Tobacco Company, Inc.

Howard M. Klein, William J. O'Brien, Conrad, O'Brien, Gellman & Rohn, P.C., Philadelphia, PA, Edward A. Greenberg, Daller Greenberg & Dietrich, Fort Washington, PA, for Lorillard, Inc.

William J. O'Brien, Conrad, O'Brien, Gellman & Rohn, P.C., Philadelphia, PA, for Loews Corporation.

Judy L. Leone, Dechert, Price & Rhoads, Philadelphia PA, Madeline M. Sherry, Stephen J. Imbriglia, Hecker, Brown, Sherry and Johnson, Philadelphia, PA, for United States Tobacco Company, UST, Inc.

Howard M. Klein, William J. O'Brien, Conrad, O'Brien, Gellman & Rohn, P.C., Philadelphia, PA, for Tobacco Institute, Inc.

Joseph W. Fullem, Jr., Patrick W. Kittredge, Kittredge, Donley, Elson, Fullem & Embick, Philadelphia, PA, Gary M. Marek, Kittredge, Donley, Elson, Fullem, & Embick, Philadelphia, PA, for Council for Tobacco Research-U.S.A., Inc.

Mark E. Squires, J. Kurt Straub, Abrahams, Lowenstein, Bushman & Kauffman, Philadelphia, PA, for Liggett Group, Inc., Liggett & Myers, Inc., Brooke Group, Ltd.

Matthew L. Myers, National Ctr. for Tobacco Free Kids, Washington, DC, for American Heart Association, American Cancer Society, American Lung Association.

MEMORANDUM

NEWCOMER, District Judge.

Presently before this Court are Defendants' Motion for Summary Judgment Based on the Statute of Limitations, Defendants' Motion for Summary Judgment Concerning Plaintiffs' Contributory Negligence, Assumption of Risk and Consent to Exposure to Hazardous Substances, and Defendants' Motion for Summary Judgment Concerning Plaintiffs' Claims for Medical Monitoring, and plaintiffs' response thereto, and defendants' replies thereto.

I. Introduction

A. Procedural History

Plaintiffs[1] have filed suit against defendants,[2] seeking the establishment of a medical monitoring program. Since the filing of plaintiffs' original Complaint in the Pennsylvania state court system approximately one year ago, this litigation has followed its own unique twists and turns. It has now, however, reached the dispositive motion stage—a stage which has seen defendants file nine joint and/or individual motions for summary judgment. Hence, the instant task before this Court is to dispose of the novel and complex issues raised by these motions. Before addressing these issues, the Court will briefly set forth the procedural and factual history of this case.

On August 27, 1996, this action was removed from state court. Plaintiffs filed a "First Amended Complaint—Class Action" on December 2, 1996. Plaintiffs' First Amended Com-

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[1] The plaintiffs are William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman and Edwark J. Slivak. Steven Arch was granted leave to withdraw from this action and his claims were dismissed without prejudice.

[2] The defendants are The American Tobacco Company, Inc., R.J. Reynolds Tobacco Company, RJR Nabisco, Inc., Brown & Williamson Tobacco Corporation, Philip Morris, Inc., Philip Morris Companies, Inc., Lorillard Tobacco Company, Inc., Lorillard, Inc., United States Tobacco Company, The Tobacco Institute, Inc., The Council for Tobacco Research-U.S.A., Inc., Liggett Group, Inc., Liggett & Myers, Inc. and Brooke Group, Ltd. Numerous other defendants have either been dismissed by order of this Court or the parties have stipulated to their voluntary dismissal.

plaint asserted the following causes of action: (1) medical monitoring; (2) intent ional exposure to a hazardous substance; (3) negligence; and (4) strict products liability. Count five of plaintiffs' First Amended Complaint averred that defendants acted in concert or pursuant to a common design.

Plaintiffs sought the following relief in their First Amended Complaint: (1) certifying this action as a class action; (2) ordering defendants to implement a Court supervised or Court-approved program to medically monitor class members; (3) an award of punitive damages, to be used for common class-wide purposes, including, without limitation, medical research on the diseases that cigarettes cause and the treatment of those diseases, medical research into the addiction, public education campaigns about the health hazards of cigarettes smoking, and programs to assist class members in efforts to quit smoking; (4) awarding such other monetary and injunctive relief as the Court deems just and proper; and (5) awarding the costs of the suit. Plaintiffs requ ested certification of the following class:

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

On June 3, 1997, this Court entered an order and opinion in which plaintiffs' motion for class certification was denied. Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D.Pa.1997). Plaintiffs' claims were not certifiable under Rule 23(b)(3) because plaintiffs did not satisfy the superiority and predominance requirements. Additionally, plaintiffs' request for certification of their medical monitoring claim was denied because the majority of relief sought by plaintiffs was predominantly compensatory as opposed to equitable. Finally, the Court denied issue certification under Rule 23(c)(4).

Subsequent to the Court's June 3, 1997 Memorandum and Order, plaintiffs filed a motion for leave to file a Second Amended Complaint, along with a renewed motion for class certification. Plaintiffs' Second Amended Complaint, which plaintiffs were granted leave to file and is now the complaint upon which plaintiffs prosecute this action, is different from plaintiffs prior two complaints in this action. In their Second Amended Complaint, plaintiffs assert only one claim against the defendants—a claim for medical monitoring. Plaintiffs have discarded their claims sounding in negligence, strict products liability and intentional exposure to a hazardous substance.[3]

In support of their medical monitoring claim, plaintiffs set forth the following facts in their Second Amended Complaint. Plaintiffs allege that defendants manufacture, promote and sell cigarettes. Defendants' earnings on cigarettes sold throughout the United States allegedly exceeded six billion dollars this past year alone, on gross sales of forty-five billion dollars. According to the Pennsylvania Department of Health, more than 22.6 billion cigarettes were sold in Pennsylvania during the fiscal year July 1995 through June 1996.

Plaintiffs allege that cigarettes contain hazardous substances that cause serious and often fatal diseases of the throat, lungs, and heart, as well as the cardiovascular and pulmonary systems generally, and cause stillbirths and neonatal deaths of babies whose mothers smoke. The hazardous substances include, inter alia, nicotine, carbon monoxide, nitrosamine, formaldehyde, formic acid, acetaldehyde, ammonia, benzene, hydrogen cyanide, and "tar," which are all highly dangerous substances.

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[3] The Court, however, notes that plaintiffs advance these three theories of liability as the underlying theories of liability for their medical monitoring claim.

Plaintiffs maintain that defendants, acting in concert or pursuant to a common design, have engaged in a wide range of conduct for which they should be held liable to plaintiffs. Defendants allegedly have known of the relationship between cigarettes and disease but have concealed their research, publicly denied the relationship between cigarettes and disease, and continue to aggressively promote and sell cigarettes. In so doing, plaintiffs contend that defendants have engaged in this conduct not only with willful, wanton and reckless disregard for the health of those who use their products, "but have intentionally and deliberately consigned millions of users to disease and death, for no reason other than to maximize [their] profits." (Second Amended Compl. ¶ 12). Further, it is alleged that these defendants have known for many years of ways to make safer cigarettes but have intentionally chosen not to do so.

Defendants have also purportedly known for many years that nicotine is addictive but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact. During the same time that defendants have publicly denied the addictive nature of nicotine, it is alleged that defendants have intentionally controlled the level of nicotine and other toxic substances in the cigarettes in order to preserve the dependence of smokers on cigarettes. Plaintiffs aver that defendants have utilized additives such as ammonia, as well as designs for which defendants have sought patents, to make cigarettes a "package" for the delivery of nicotine. During this same period of time, plaintiffs allege that defendants have also intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them.

In order to preserve and increase their sales of cigarettes, and despite their knowledge of the diseases and harm that cigarettes cause, it is alleged that defendants have spent millions

of dollars each year in advertising and promoting cigarettes and have geared their efforts particularly towards teenagers and children through such efforts as the "Joe Camel" advertising campaign because defendants have allegedly known that unless a person begins smoking before the age of twenty, the person is unlikely to ever begin.

Plaintiffs further allege that in their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, defendants have testified falsely under oath before the United States Congress, provided false explanations to customers and governmental entities about the health hazards of tobacco and the harmful quantities of nicotine, concealed their secret research and testing on the dangers of cigarette smoking, concealed their deliberate manipulation of nicotine levels of cigarettes, required employees, under threat of severe legal sanctions, to keep secret all information that they have learned through their employment about the dangers of cigarette smoking, and concealed documents through devices such as the unwarranted invocation of the attorney client privilege.

In addition, plaintiffs claim that defendants have continued to make false claims to the public, governmental agencies and the United States Congress that they have been making their products as safe as feasible. Plaintiffs assert that these claims are false because defendants allegedly have had the ability, for some time now, to make safer cigarettes by removing hazardous substances from them such as nitrosamine, ammonia, benzene products and others, yet defendants have failed and intentionally refused to remove these hazardous substances.

Based on the conduct of defendants, plaintiffs contend that defendants are liable to them under their medical monitoring claim. Plaintiffs seek the following relief: (1) certifying this action as a class action pursuant to Fed.R.Civ.P. 23(a) and (b)(2);

(2) establishing a Court-supervised program, to be funded by defendants, through which the class members would undergo periodical medical examinations in order to promote the early detection of diseases caused by smoking; and (3) awarding the costs of this suit and such other relief as the Court deems just and proper.

By Order dated August 22, 1997, this Court certified the following class pursuant to Rule 23(b)(2):

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

The Court found that the requirements of Federal Rule of Civil Procedure 23(a)(1)-(4) had been satisfied and that class certification was proper under Fed.R.Civ.P. 23(b)(2). In reaching this conclusion, it was noted that the record of the action did not demonstrate the existence of individual issues which would preclude certification. In this opinion, this Court explained that it would revisit the issue of class certification, which it recently did.

By Memorandum and Order dated October 17, 1997, this Court decertified this case as a class action pursuant to Fed. R. Civ. P. 23(c)(1). In the memorandum opinion, the Court noted that this case could not proceed as a class action under Rule 23(b)(2) because too many individual issues were implicated by the facts and circumstances of this case. Thus, pursuant to this Court's discretion under Fed.R.Civ.P. 23(c)(1), the Court vacated its August 22, 1997 Order, which had granted certification in this case.

Consequently, plaintiffs now proceed solely in their individual capacities. As stated above, defendants have filed nine joint and/or separate motions for summary judgment. In this memorandum, the Court will only address defendants' motion for summary judgment based on the statute of limitations, defendants' motion for summary judgment concerning plaintiffs' contributory negligence, assumption of risk and consent to exposure to hazardous substances, and defendants' motion for summary judgment concerning p laintiffs' claims for medical monitoring. Before turning to the substance of defendants' motions, the Court will briefly describe plaintiffs' proposed medical monitoring program and will set forth the plaintiffs' medical histories and conditions.

B. Plaintiffs' Proposed Medical Monitoring Program

At the outset, it is noted that the parties contest whether the plaintiffs actually advance one or two medical monitoring programs. From defendants' perspective, plaintiffs advance two separate and distinct programs that vary significantly. One program is advanced by Drs. Petty and Hyers; the other program is advanced by Dr. Burns. Defendants state that Dr. Hyers, one of plaintiffs' experts, expressly acknowledged that there exists a lack of consensus among plaintiffs' experts as to who should be screened, what tests should be administered, and when the tests should be administered. Dr. Hyers stated that he expects that the plaintiffs' experts will at some point reach a "compromise." (Defs.' Ex. 2). In contrast to defendants' position, plaintiffs represent that they propose only one medical monitoring program.

While it appears from the record that plaintiffs' experts have advanced two medical monitoring programs throughout the course of this litigation, the plaintiffs presently represent that they advance only one program—the program advanced by Dr.

Burns. Because plaintiffs represent that they are advancing the program suggested by Dr. Burns, the Court will base its consideration of defendants' summary judgment motions on the "Burns Program."

In this regard, the Court notes that the Burns Program is designed to monitor and detect three diseases which are allegedly caused by smoking: cardiovascular disease, lung cancer and chronic obstructive pulmonary disease ("COPD"). Further, seven diagnostic tests and procedures will constitute the components of the medical monitoring program: (1) electrocardiogram ("EKG"); (2) cardiovascular risk factor assessment; (3) chest x-ray screening; (4) exercise stress test; (5) physical examination, including blood pressure, blood lipid and total cholesterol; (6) pulmonary function test, including spirometry[4]; and (7) sputum cytology.[5] (Pls.' Ex. 72). However, in order to fully put defendants' arguments in context, the Court will describe in greater detail the two programs which were advanced by plaintiffs.

1. The Petty-Hyers Program

Drs. Petty and Hyers have jointly proposed a medical monitoring program. Participants in the medical monitoring program would be limited to current smokers and "recent quit-

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[4] Spirometry measures the amount of air which can be inhaled and then exhaled rapidly. Full pulmonary function measures, among other things, lung volume and efficiency of gas exchange. (Defs.' Ex. 2 at 99-100).

[5] Sputum cytology is the examination of cells of expectorated matter.

ters" with 20 pack-year smoking histories.[6] (Defs.' Ex. 10 at 6, Report of Thomas L. Petty, M.D., and Thomas M. Hyers, M.D. ("Petty-Hyers Report")). Under this entry level requirement, it appears that at least one of the plaintiffs, Ciaran McNally, would not be eligible for medical monitoring[7].

The entry point for the Petty-Hyers program is annual spirometric testing of 20 pack-year smokers for detection of COPD. (Petty Dep. Defs.' Ex. 4 at 59-63; Hyers Dep. Defs.' Ex. 2 at 224-25). Only after a finding of abnormality through spirometry would further testing by chest x-ray and sputum cytology be performed. Id. EKGs, exercise stress tests and pulmonary function testing other than spirometry are excluded from their monitoring regime. (Petty Dep. Defs.' Ex. 4 at 129-30; Hyers Dep. Defs.' Ex. 4 at 99-104). The purpose of detecting COPD would not be to treat the condition. Both Drs. Petty and Hyers acknowledge that there is no evidence that lung function improves through medical treatment. (Petty Dep. Defs.' Ex. 4 at 156-58; Hyers Dep. Defs.' Ex. 2 at 207-08). Rather, they urge screening of smokers because they believe the presence of COPD may be a surrogate marker for risk of lung cancer. (Defs.' Ex. 10 at 4-7). In advancing their program, Drs. Petty and Hyers agree with the accepted medical principle that screening of smokers should not be prescribed unless it would "substantially decrease the premature morbidity and mortality from smoking related diseases." Id. at 8.

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[6] "Pack-year" refers to the number of years during which an individual has smoked a pack of cigarettes per day. For example, a person who smokes one pack a day for 10 years has a 10 pack-year history. A person smoking half a pack per day for 10 years has a five pack-year history.

[7] Plaintiff McNally has smoked less than a pack per day for slightly over 10 years. (Hyers Dep. Ex. 2 at 118-19, 244).

Drs. Petty and Hyers both have conceded that there are no clinical studies that support their belief that their program would prove efficacious under these principles. (Petty Dep. Defs.' Ex. 4 at 102-04; Hyers Dep. Defs.' Ex. 2 at 138). For example, bo th Drs. Hyers and Petty agree that there is no study establishing that a diagnosis of abnormal pulmonary function leads to a greater proportion of smokers ceasing smoking. (Defs.' Ex. 4 at 123; Defs.' Ex. 2 at 209). Drs. Petty and Hyers also agree that lung cancer screening using chest x-ray or sputum cytology has not been demonstrated to be efficacious, and that studies to date have uniformly reached the opposite conclusion. (Defs.' Ex. 4 at 64-65; Defs.' Ex. 2 at 139-40, 143-48).

In sum, Dr. Petty has admitted that his proposed program is "not today accepted" in the medical community. (Defs.' Ex. 4 at 78-79, 153-54), and both experts have acknowledged that central aspects of the program would be experimental in nature. For example, as to the use of sputum cytology, the Petty-Hyers Report itself points out that the test "is expensive, laborious and difficult to standardize" and that its "role ... is still under intense study and is being constantly refined." (Defs.' Ex. 10 at 5). In addition, Dr. Petty has written that "it is not likely that sputum cytology based solely on human diagnosis will ever become practical on a widespread basis." (Defs.' Ex. 21 Thomas L. Petty, "Lung Cancer Screening", in Comprehensive Therapy, 1995 21(8) 432-437, 434). Similarly, as to the use of spirometry, Dr. Petty recently wrote that "an intensive effort in COPD is needed because despite several decades of COPD research, virtually all of the fundamental issues about COPD remain...." (Defs.' Ex. 22 Thomas L. Petty, "Building a National Strategy for the Prevention and Management of Research in Chronic Obstructive Pulmonary Disease", in JAMA 227(3), 246-53, 251 (January 15, 1997)).

2. The Burns Program

In the Burns Program, Dr. Burns classified smokers by "pack-year" and age criteria to determine participation in various forms of screening. Under the new proposal, the eligibility of smokers for monitoring would be determined in the following manner:

> 1. Persons age 25 and older and who have smoked an average of 10-15 or more cigarettes per day for 10 years would receive an EKG, cardiovascular risk factor assessment, and a physical examination;
>
> 2. Persons age 40 and older who have smoked an average of 15 or more cigarettes per day for 20 years would receive an EKG, cardiovascular risk factor assessment, physical examination, and exercise stress test;
>
> 3. Persons age 45 and older and who smoked an average of 15 or more cigarettes per day for 20 years would receive an EKG, cardiovascular risk factor assessment, physical examination, an exercise stress test, and a pulmonary function test; and
>
> 4. Persons age 50 and older and who smoked an average of 15 or more cigarettes per day for 20 years would receive an EKG, cardiovascular risk factor assessment, physical examination, an exercise stress test, a pulmonary function test, a chest x-ray, and sputum cytology.

(Defs.' Ex. 3. ¶¶ 3, 4, 6).

Following this initial testing, a physical examination and EKG would be repeated annually, as would any other test showing a "significant abnormality". (Defs.' Ex. 3 ¶¶ 5, 6). All remaining tests would be repeated every two to three years. Id.

As Dr. Hyers has noted, there are major differences between the Burns Program and the Hyers-Petty Program, including:

> 1. Dr. Burns would screen for more smokers than would Drs. Petty and Hyers; smokers with as few as five-pack years could receive medical monitoring. (Defs.' Ex. 3 ¶ 4). Dr. Hyers, on the other hand, stated that 20 pack-years is the starting point where there is a significant enough risk to commence monitoring. (Defs.' Ex. 2 at 20-21).
>
> 2. Dr. Burns would routinely screen some or all monitoring participants using EKGs, exercise stress testing, and pulmonary functions testing other than spirometry (Defs.' Ex. 3 ¶¶ 3, 4, 6). None of these tests are recommended by Drs. Hyers and Petty. (Defs.' Ex. 4 at 129-30; Defs.' Ex. 2 at 99-104).
>
> 3. Dr. Burns would routinely screen some participants using chest x-ray and sputum cytology, (Defs.' Ex. 3, ¶¶ 3, 4), while Drs. Petty and Hyers would use these tests only on persons with abnormalities detected using spirometry. (Defs.' Ex. 4 at 59-63; Defs.' Ex. 2 at 224-25).

Unlike Drs. Hyers and Petty, Dr. Burns did not support his proposal by arguing for reconsideration of the accepted view that screening of asymptomatic smokers is not efficacious. Rather, he has defended deviating from standard medical prac-

tice principally by pointing to a possible increase in smoking cessation. He explained that early detection of a smoking-related disease may, by allowing a person to know his or her current health status, provide "substantial increased motivational force" to stop smoking. (Defs.' Ex. 9 at 82-83, 88-90).

Dr. Burns has argued that this opportunity to stop smoking constituted the "alteration benefit" of his program. Id. He, like plaintiffs' other experts, was unable to cite specific literature supporting his views. When pressed to cite support for his views, he replied that his various opinions were based on a "vast body" of literature, but was unable to identify specific support because he does not "store information that way." Id. at 66-72, 187.

Dr. Burns has stated that he could not testify that his program would work. He could testify only that "the program that I have suggested here might work.... I'm simply making a recommendation about one method by which the court might decide to resolve this issue." Id. at 29.

C. The Plaintiffs' Individual Circumstances

The Court will briefly summarize the medical history of plaintiffs. Before doing so, the Court notes that none of plaintiffs' medical monitoring experts has examined the plaintiffs or reviewed their medical records. (Defs.' Ex. 4 at 36-40; Ex. 2 at 55-56). Plaintiffs' experts acknowledge that they lack information as to whether individual plaintiffs have already received screening, have already been diagnosed with the subject diseases, or possess risk factors other than smoking for the diseases as to which monitoring is proposed. Despite this lack of knowledge, Dr. Burns asserts that he is capable of opining that specific plaintiffs should receive certain specific forms of screening. (Defs.' Ex. 3 ¶¶ 6, 7). Dr. Petty, on the other hand, admitted that he lacks an adequate basis to assess whether any individual

plaintiff needs any particular kind of medical monitoring at the present time. (Defs.' Ex. 4 at 36-42).

The record in this case includes a wealth of information regarding the medical histories, smoking cessation efforts, and past medical monitoring of each plaintiff. For instance Norma Rodweller has high cholesterol and a family history of heart disease. She has been diagnosed with vocal chord polyps and COPD, and has shown abnormalities in pulmonary function tests. She has also been tested for potential coronary insufficiency. She nevertheless continues to smoke despite having been told by doctors that smoking aggravates her medical illnesses. She has also refused her doctor's directions to obtain necessary medical screening such as pap smears and mammograms.

Ciaran McNally is 26 years old. She has been a regular smoker since she was 15 years old and smokes 10-15 cigarettes per day. She received chest x-rays when appropriate in response to symptoms. She has not followed her doctors' advice to quit smoking while taking oral contraceptives.

William Barnes is mildly obese with hypertension and elevated cholesterol. He has a history of coronary artery disease, and he has been diagnosed with hypertensive atherosclerotic heart diseases. He is also a heavy drinker. He has received EKGs, chest x-rays and pulmonary function testing as appropriate in response to symptoms. He has been told to quit smoking every time he visited his doctor, and continues to smoke despite evidence of fibrosis of his lung.

Catherine Potts has been diagnosed with COPD, coronary artery disease, angina, and hyperlipidemia and hypertension. She continues to smoke despite being advised by her doctors to cease due to cardiac problems and a potential vocal

chord malignancy. She has not followed her doctor's directions for testing, including a recommended colonoscopy following rectal bleeding. On one occasion, she insisted on being discharged from the hospital against medical advice after being diagnosed with possible myocardial infraction. She continues to drink caffeinated beverages despite begin advised by her doctors to cease doing so.

Edward Slivak has continued smoking despite abnormal pulmonary function tests and abnormal chest x-rays leading to a diagnosis of COPD. He has high blood pressure and elevated cholesterol, has received EKGs and has been diagnosed with myocardial infarction. Although he has been advised repeatedly not to smoke due to his various medical conditions, he is still smoking.

Barbara Salzman continues to smoke despite having been diagnosed with emphysema and mild to moderate COPD based on pulmonary function tests and chest x-rays. She has received chest x-rays, MRI scans and EKGs in response to her symptoms. She has not, however, mentioned her emphysema to her family physician, explaining that she does not desire to follow-up because "I don't like to look for trouble." She drinks an excessive amount of caffeine and has a family history of heart disease.

The Court will now address the issues raised by defendants' summary judgment motions. The plaintiffs have filed responses to which the defendants have filed replies.

II. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse

Electric Co., 862 F.2d 56, 59 (3d Cir.1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). The evidence presented must be viewed in the light most favorable to the nonmoving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir.1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325, 106 S.Ct. at 2553-54. Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324, 106 S.Ct. at 25 53. Moreover, when the non-moving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir.1987) (quoting Celotex, 477 U.S. at 322, 106 S.Ct. at 2552).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322, 106 S.Ct. at 2552). The non-movant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a

reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at 322, 106 S.Ct. at 2552. The non-movant cannot avoid summary judgment by substituting "conclusory allegations of the complaint ... with conclusory allegations of an affidavit." Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990). Rather, the motion must be denied only when "facts specifically averred by [the non-movant] contradict facts specifically averred by the movant." Id.

III. Statute of Limitations

Defendants move for summary judgment based on the statute of limitations. Defendants contend that Pennsylvania's two year statute of limitations applies to the instant case because plaintiffs' underlying legal theory is one of negligence. 42 Pa. Cons.Stat. Ann. § 5524. Applying this statute of limitations, defendants submit that all of the plaintiffs are barred from prosecuting their claims because they either knew, or should have known, that smoking placed them at an increased risk of contracting a serious latent disease years before any of them commenced this litigation. Defendants additionally argue that they should not be estopped from asserting the statute of limitations defense, that the doctrine of laches does not apply to this case, and that the continuing tort doctrine does not apply to this case.

In response, plaintiffs ask this Court to deny defendants' motion for the following reasons. First, plaintiffs argue that the equitable doctrine of laches controls, thus making the only relevant considerations whether defendants can show prejudice from the timing of plaintiffs' suit or whether plaintiffs unjustifiably delayed in bringing their medical monitoring claim. Second, due to defendants' ongoing wrongful conduct, the continuing wrong doctrine applies and prevents any applicable statute of limitations from beginning to run until the conduct ceases. Third,

due to the nature of the injury of medical monitoring case—long-term exposure increasing the risk of latent disease—there could have been no earlier accrual of plaintiffs' claims. Fourth, because medical monitoring is a relatively new cause of action, plaintiffs could have not brought this action until recently.

As a threshold matter, the Court finds that a statute of limitations applies to this case, not the doctrine of laches. To begin, this action is not purely an equitable action. Admittedly, the Court has recently concluded that this action is both inherently equitable and legal. See Barnes v. American Tobacco Co., Civil Action No. 96-5903, slip op. at 14, — F.Supp. ——, —— [1997 WL 810426] (E.D.Pa. Oct. 10, 1997). Hence, plaintiffs' argument that this action is purely equitable has already been rejected. More importantly, however, a statute of limitations should apply to this action because plaintiffs could have brought this action at law or in equity.

It has been long established that equity will follow the law and will apply the statute of limitations for the corresponding legal action. Ebbert v. Plymouth Oil Co., 348 Pa. 129, 34 A.2d 493, 495 (1943). In particular, where a plaintiff could maintain an action at law but fails to do so within the required time period, he will not be heard to bring the same action in equity. Id. at 495-96; City of Philadelphia v. Louis Labs., Inc., 201 Pa.Super. 16, 189 A.2d 891, 893 (1963). In Ebbert, the Supreme Court of Pennsylvania stated:

> [I]t is well established that equity will frequently follow the statute of limitations which controls analogous proceedings at law. This is especially, if not invariably, true if the cause of action is not exclusively cognizable in equity, which is the situation here, because, where an accounting is desired, it may

> be obtained in a common-law proceeding.... Because of this concurrent jurisdiction the statute of limitations is generally held to be a bar to proceedings in equity for an accounting when it would be a bar to an action at common law for the same matter.

Ebbert, 34 A.2d at 495-96 (emphasis added). Thus, if a plaintiff is barred by the statute of limitations from bringing an action at law, this same plaintiff will be barred from bringing the concurrent action in a court of equity.

Fortuitously, the Third Circuit, in Algrant v. Evergreen Valley Nurseries Ltd., 126 F.3d 178 (3d Cir.1997), recently addressed a very similar issue. In Algrant, a question arose as to whether the statute of limitations that attaches to underlying substantive claims in a declaratory judgment action also applies to the actual declaratory judgment counts that were based on the underlying substantive claims. In answering this question in the affirmative, the Third Circuit explicitly noted that "[i]t is settled ... that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy." Id. at 181 (citation omitted). The Third Circuit also approvingly cited the Supreme Court's holding that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy."

Based on this persuasive reasoning, the Court concludes that once the statute of limitations has run on an action at law, a plaintiff cannot save his claim by bringing the concurrent claim in equity. For the purposes of this case, there exist two pertinent inquiries: first, does plaintiffs' current equitable action have a concurrent legal action; and second, if yes, what statute of limitations applies? The first line of inquiry has already been answered; there is no doubt that this action has a purely legal

concurrent action. As stated in this Court's Memorandum and Order dated October 12, 1997, plaintiffs could have brought an entirely legal action by simply requesting lump-sum money damages. Barnes, slip op. at 11-12, — F.Supp. at ——— - ———. Consequently, because plaintiffs could have brought this action at law, the next line of inquiry is what statute of limitations would be applied in that legal action.[8]

In order to determine what statute of limitations should apply in this action, the Court must look at the theories of liability that underlie a medical monitoring claim. Under Redland Soccer Club, Inc. v. Dep't of the Army, the Supreme Court of Pennsylvania stated that a plaintiff, in part, must prove that he was exposed to a proven hazardous substance caused by the defendant's negligence. 696 A.2d 137, 145 (Pa.1997).[9] The

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[8] The Court also rejects plaintiffs' argument that Pennsylvania law would not apply any statute of limitations to a medical monitoring claim. Plaintiffs cite Simmons v. Pacor, 543 Pa. 664, 674 A.2d 232 (1996) to support this position. Simmons, however, does not address this issue at all. Simmons merely stated that, under certain circumstances, "recovery for medical monitoring is appropriate and just...." This language simply does not address plaintiffs' extraordinary argument that no statute of limitations applies to a medical monitoring claim unlike every other cause of action under Pennsylvania law.

[9] In Redland Soccer, the Pennsylvania Supreme Court set forth the elements that a plaintiff need prove in order to prevail on a common law claim for medical monitoring:

(1) exposure greater than normal background levels;
(2) to a proven hazardous substance;
(3) caused by the defendant's negligence;
(4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease;
(5) a monitoring procedure exists that makes the early detection of the disease possible;

(continued)

Redland Soccer court thus found that a plaintiff must establish that the defendant was negligent in order to set forth a medical monitoring claim. Because negligence is the theory of liability that underlies a medical monitoring claim, this Court predicts that the Pennsylvania Supreme Court, if confronted with this issue, would apply the two year statute of limitations set forth in 42 Pa. Cons.Stat. Ann. § 5524. Moreover, to the extent that strict products liability or an intentional tort can act as the underlying theory of liability for a medical monitoring claim, which the parties dispute, the applicable statute of limitations would still be two years because intentional torts and strict products liability are governed by 42 Pa. Cons.Stat. Ann. § 5524. Having determined what statute of limitations applies to this action, the Court will now ascertain whether plaintiffs would have been barred from maintaining a legal action because of the operation of the statute of limitations.

Generally, a plaintiff "is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Pocono International Raceway, Inc. v. Pocono Produce, 503 Pa. 80, 468 A.2d 468, 471 (1983). A claim under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim suable." Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 20 (3d

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[9] (continued)

(6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and
(7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. The Court explained that "[p]roof of these elements will naturally require expert testimony." Id. at 146-47.

Cir.1966). The "statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake, or misunderstanding do not toll the running of the statute of limitations." Pocono, 468 A.2d at 471. However, there are some exceptions to this narrow rule.

The "discovery rule" is a "narrow exception to this general rule." Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1200 n. 4 (Pa.Super.1997). The discovery rule tolls the statute of limitations to reflect the "plaintiff's complete inability, due to facts and circumstances not within his control, to discover an injury despite the exercise of due diligence." Kingston Coal Co. v. Felton Mining Co., Inc., 456 Pa.Super. 270, 690 A.2d 284, 288 (Super.1997). Under the discovery rule, the statute of limitations begins to run when the "plaintiff knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct." Bradley v. Ragheb, 429 Pa.Super. 616, 633 A.2d 192, 194 (Super.1993).

The plaintiff has the burden of proving that he exercised reasonable diligence in bringing his claim. Cochran v. GAF Corp., 542 Pa. 210, 666 A.2d 245, 249-50 (1995). Reasonable diligence is "an objective, rather than a subjective standard. Under this standard, the plaintiff's actions must be evaluated to determine whether he exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." Id. at 249. Reasonable diligence "may require one to seek further medical examinations as well as competent legal representation." Id. In addition, "when information is available, the failure of a plaintiff to make proper inquiries is a failure to exercise reasonable diligence as a matter of law." Kingston Coal, 690 A.2d at 289.

In contrast, plaintiffs contend that the continuing tort doctrine applies to this case. Plaintiffs cite to the following passage in Page v. United States, 729 F.2d 818, 821-22 (D.C.Cir.1984), for the proposition that they may avail themselves to the doctrine of continuing harm in lieu of the discovery rule:

> It is well-settled that when a tort involves continuing injury, the cause of action accrues, and the limitations period begins to run, at the time the tortious conduct ceases. Since usually no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm, it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, since one should not be allowed to acquire a right to continue the tortious conduct, it follows logically that statutes of limitation should not run prior to its cessation....

Relying on this case, and others, plaintiffs argue that their medical monitoring claims are not barred by the statute of limitations because the continuing harm doctrine applies. Specifically, plaintiffs argue that "defendants' defective design, manufacturing, and sale of cigarettes that are intended to be as addictive as possible, suppression of research regarding the harmfulness of smoking and other conduct constitute a continuing harm that has, and continues to be, inflicted on plaintiffs and the entire class." (Pls.' Br. at 100) (emphasis added).

Notwithstanding plaintiffs' argument, the Court finds that the continuing harm doctrine simply does not apply to the facts of this case. It is axiomatic that the statute of limitations applies in cases involving product defects and begins to run when the plaintiff knows, or should have known, of his injury and that it has been caused by another. Bradley, 633 A.2d at 194;

Cochran, 666 A.2d at 249. Moreover, in "a latent disease case [or "creeping disease" case], ... where the claim is not discoverable despite the exercise of due diligence, the limitations period is tolled under the 'discovery rule.'" Gunsalus v. Celotex Corp., 674 F.Supp. 1149, 1153 (E.D.Pa.1987) (citation omitted). In cases involving exposure to a hazardous substance, Pennsylvania co urts specifically have rejected the continuing tort theory. As the Pennsylvania Superior Court has written:

> In Anthony v. Koppers Co., 284 Pa.Super. 81, 425 A.2d 428 (1980), revers'd on other grounds, 496 Pa. 119, 436 A.2d 181 (1981), we reviewed the application of the statute of limitations to cases in which the plaintiff has contracted a disease from a continuous exposure to a hazardous substance. We found that other jurisdictions have taken one of three approaches to these "creeping disease" cases:
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> A few jurisdictions have held that in a creeping disease case the statute starts to run with the plaintiff's "first breath" if the hazardous substance, even though he does not discover his disease or its cause until many years later. The first breath rule, however, has led to such harsh results that it has been widely repudiated. Other jurisdictions have viewed subjecting the plaintiff to exposure as a continuing tort and have adopted what may be called "last breath" rule, under which the statute of limitations starts to run at the last exposure, but neither has this rule proved satisfactory. Garrett v. Raytheon Co., 368 So.2d 516 (Ala.1979) (statute of limitations barred suit for injuries from exposure to radiation where the last exposure occurred in 1957, even though symptoms were not manifest until 1975). Accordingly, a majority of the jurisdictions that have considered

> this issue, including the Supreme Court of the United States, have held that the discovery rule applies to creeping disease cases. See Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949).
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> * * *
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> We further noted, that while our Supreme Court had indicated that it might apply a "last breath" analysis, see Plazak v. Allegheny Steel Co., 324 Pa. 422, 188 A. 130 (1936), it had in fact subsequently applied the discovery rule. See Ciabattoni v. Birdsboro Steel Foundry & Machine Co., 386 Pa. 179, 125 A.2d 365 (1956).

Staiano v. Johns Manville Corp., 304 Pa.Super. 280, 450 A.2d 681, 683-84 (1982) (emphasis added) (citations omitted). Consequently, it is obvious to this Court that the Pennsylvania state courts apply the discovery rule in "creeping disease" cases, not the continuing tort doctrine.

The Third Circuit agrees. In Kichline v. Consolidated Rail Corp., 800 F.2d 356 (3d Cir.1986), the Court of Appeals explained:

> [C]ontinuing conduct of defendant will not stop the ticking of the limitations clock begun when plaintiff obtained requisite information. On discovering an injury and its cause, a claimant must choose to sue or foregone that remedy.... Once discovery occurs, ... it becomes necessary to consider the other side of the coin—the policy against the presentation of stale claims.

Id. at 360. See also Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 170 (5th Cir.) (where "the causal relationship between

smoking and [plaintiff's] injuries was known to [plaintiff] at least as early as February 1986 ... the theory of continuing tort is immaterial ... because the statute of limitations began to run in February of 1986").

Under plaintiffs' theory, the statute of limitations would not begin to run until the plaintiffs were no longer "exposed" to the alleged hazardous substances in defendants' cigarettes, without regard to whether or not they knew of their injury and its cause. This approach is contrary to Pennsylvania law and its application here would "hinder and frustrate the ultimate aim of limitations periods." Casner v. American Federation of State, County & Municipal Employees, 658 A.2d 865 (Pa.Cmwlth.1995). Pennsylvania courts simply do not apply the continuing tort doctrine to cases involving defective products or latent diseases. Significantly, plaintiffs do not dispute that the discovery rule applies to products liability cases, and they do not cite any Pennsylvania product liability cases that actually apply the continuing tort theory to toll the running of the statute of limitations. Further, plaintiffs do not in any manner attempt to address the Staiano case, wherein the Pennsylvania Superior Court held that the discovery rule, not the continuing tort doctrine, applies to a "creeping disease case" based upon asbestos exposure. Finally, the cases cited by plaintiffs, which do not involve work place discrimination, simply do not support their position.[10] Because plaintiffs have been unable to demonstrate that the continuing tort doctrine should be applied to the facts of this case, the Court will only apply the discovery rule, if it is applicable.

A claim under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim

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[10] See (Defs.' Reply Br. Statute Limitations at 10-12).

suable." Mack Trucks, 372 F.2d at 20. Hence, the first step in this Court's analysis is to determine when the final event, necessary to make plaintiff's medical monitoring claim suable, occurred. Examining the elements of a medical monitoring claim, the Court finds that each plaintiffs' cause of action for medical monitoring accrued when the plaintiff was placed at a "significantly increased risk of contracting a serious latent disease."[11] Redland, 696 A.2d at 145.

It is at this point in time—when a person, because of another's negligence in exposing him or her to a hazardous substance beyond normal background levels, is placed at a significantly increased risk of contracting a serious latent dis-

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[11] In adopting this event as the "last event" that makes plaintiffs' claim suable, the Court perforce rejects plaintiffs' argument that a medical monitoring claim is not about "increased risk" but rather "long- term exposure." (Pls.' Br. at 102-04). It is not "the fact of long-term exposure" which creates the need and justification for medical monitoring; rather, it is the "increased risk of contracting a serious latent disease" which creates the need for medical monitoring. For example, long-term exposure to a substance that does not cause an increased risk of disease would not entitle a plaintiff to recover medical monitoring. Conversely, short-term exposure to a hazardous substance that does cause an increased risk of contracting a serious latent disease would entitle a plaintiff to recover medical monitoring. For example, if a nuclear power plant negligently released hazardous substances over a wide geographical area over a short period of time, and the people within this geographical area were placed at a significantly increased risk of contracting a serious latent disease as a proximate result of this exposure, all of these individuals would be entitled to bring a medical monitoring claim. Thus, a medical monitoring claim need not be about "long-term exposure," rather the central consideration in determining a plaintiff's entitlement to maintain such a claim is whether this person has been placed at a significantly increased risk of contracting a serious latent disease.

ease—that a person can maintain a medical monitoring claim. After a person has been exposed to a hazard substance beyond normal background levels due to another's negligence, and has been placed at a significantly increased risk of contracting a serious latent disease as a proximate result of the exposure, this person can successfully maintain a medical monitoring claim as long as this person can satisfy the remaining elements articulated in Redland, that is, proving "a monitoring procedure exists that makes the early detection of the disease possible; the prescribed regime is different from that normally recommended in the absence of the exposure; and the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles." Id. at 147. Having determined when the last event needs to occur to make a medical monitoring claim suable, the Court will now determine when the "last event" occurred for each plaintiff that made their medical monitoring claim suable.

In order to determine when the "last event" occurred for each plaintiff, the Court must perforce determine when their exposure to smoking placed them at "a significantly increased risk of contracting a serious latent disease." To simply this inquiry, and to err in favor of plaintiffs, this Court will use plaintiffs' experts' own proposed testimony as to when each and every named representative became eligible to participate in the medical monitoring program. In this regard, plaintiffs' experts have propo sed certain dates at which plaintiffs would be entitled to participate in the proposed medical monitoring program. According to plaintiffs' expert Dr. Burns, a person who has smoked 15-20 cigarettes a day for 10 years would be entitled to receive three of the seven proposed tests, i.e., it is only after a person has smoked 10-15 cigarettes per day for 10 years that this person has been placed at a "significantly increased risk of contracting a serious latent disease," which would entitle this person to participate, albeit not fully, in plaintiffs' proposed

program[12]. Under the Petty-Hyers Program, a person would be entitled to medical monitoring if he or she has a twenty pack-year history, thus, it is at the twenty pack-year level that a person, under the Petty-Hyers Program, is placed at a "significantly increased risk of contracting a serious disease." To err in favor of the plaintiffs, this Court will only apply the "twenty pack-year" level in determining when the plaintiffs' medical monitoring claims accrued.[13]

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[12] Under this scenario, a five-year pack smoker (a person who has smoked 10 cigarettes per day for 10 years) would qualify for medical monitoring because according to plaintiffs' experts this person has been placed at a significantly increased risk of contracting a serious latent disease.

[13] In applying this twenty pack-year level, the Court perforce rejects plaintiffs' argument that each named plaintiff's claim accrued only after they met the certain requirements of each sub-level of Dr. Burns' program. In their brief, plaintiffs argue that their claims could not have accrued— in other words, they were not placed at an increased risk of contracting a serious latent disease—until each plaintiff had met the requirements of the sub-level medical monitoring group for which they are currently able to participate. For example, plaintiffs argue that Mr. Barnes was not able to receive the full complement of medical monitoring tests (all seven diagnostic tests) until he had smoked one pack per day for twenty years and reached the age of 50; under plaintiffs' reasoning, Mr. Barnes' right to participate in the full range of medical monitoring did not arise until last year, when he reached the age of 50. Based on this reasoning, plaintiffs contend that Mr. Barnes' claim cannot be time-barred because his claim did not accrue until last year. However, the following illustration will expose the specious nature of plaintiffs' argument. Under plaintiffs' proposed program, a person can participate in the first sub-level of his medical monitoring program w hen he or she reaches the age of 25 and has smoked 10-15 cigarettes for 10 years. In Mr. Barnes' situation, he would have been eligible to participate in the first sub-level of plaintiffs' proposed

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Applying the twenty pack-year level, the Court concludes that five of the six plaintiffs were placed at a "significantly increased risk of contracting a serious latent disease," and thus the last event occurred which would make their medical monitoring claims suable, many years ago. Ms. Rodweller has been smoking approximately one to one-a-half packs of cigarettes per day for about forty-two years. (Rodweller Dep. at 8, 15). At a minimum, Ms. Rodweller became a twenty pack-year smoker in 1970; it was during this year in which she was placed at a

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[13] (continued)

medical monitoring group in 1979 because he was over 25 years of age and had been smoking 15-20 cigarettes a day since 1969. By plaintiffs' experts' own testimony, as of 1979, Mr. Barnes had been placed at a "significantly increased risk of contracting a serious latent disease" due to his exposure to cigarette smoking, i.e., Mr. Barnes had been injured. Thus, if Mr. Barnes was aware of this injury and its cause in 1979, he would have had only two years from the date of injury to bring his claim for medical monitoring. Under plaintiffs' reasoning, if Mr. Barnes failed to bring his claim for medical monitoring before the end of 1981, Mr. Barnes could bring a medical monitoring claim after he reached the next sub-level of plaintiffs' proposed medical monitoring claim. For example, a person, under plaintiffs' program, is entitled to receive four diagnostic tests after they reach the age of 40 and have smoked 15 or more cigarettes for 20 years. Applied to Mr. Barnes' circumstances, Mr. Barnes would have been eligible for sub-level two in 1987 because he was forty years of age and had smoked the requisite number of cigarettes for 20 years. It appears that plaintiffs are arguing that a person receives a new "injury" each time they qualify for different diagnostic testing, and as such, their claim does not accrue for each sub-level until they reach the requirements for that sub-level.

The Court, however, must reject this reasoning as nonsensical. In order to preserve the integrity and validity of medical monitoring claims, there must be a date certain on which an individual's injury occurs, i.e., a person's injury under medical monitoring, like all other

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"significantly increased risk of contracting a serious latent disease." Therefore, Ms. Rodweller had approximately until the end of 1972 to bring her medical monitoring claim; she did not. Thus, unless Ms. Rodweller can demonstrate that her claim is saved by the discovery rule, her claim would be time-barred. A review of the smoking history of four of the other five plaintiffs demonstrates that they are in similar position as Ms. Rodweller.[14]

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[13] (continued)

causes of action, only accrues at one time. For example, in Mr. Barnes' case, Mr. Barnes was injured—he sustained an increased risk of contracting a serious latent disease—in 1979 under Dr. Burns' program and in approximately 1984 under the Petty-Hyers Program. Thus, Mr. Barnes only had, at the outside, two years from 1984 to sue for medical monitoring.

Plaintiffs cannot avoid the statute of limitations by claiming that a new injury arises each time Mr. Barnes becomes entitled to participate in a more advanced medical monitoring program. The types of tests that a plaintiff becomes entitled to participate in at each sub-level of a medical monitoring program do not at all effect the timing of when the plaintiff's right to bring a medical monitoring claim accrues. If plaintiffs' position was accepted, plaintiffs could forever avoid the bar of the statute of limitations by simply constructing many different levels in their medical monitoring program and claiming that each plaintiff has recently satisfied these requirements, even if the plaintiff had knowledge of his injury and its cause for many years. This result is anathema to our system of jurisprudence, which provides stability to everyday life by ensuring that stale claims will not be cognizable in a court of law.

[14] Ciaran McNally has only been smoking for approximately eleven years; her claim could not have accrued until sometime last year. Thus, the statute of limitations would not bar her claim.

Ms. Salzman has been smoking at least one to one-a-half packs of cigarettes per day for about forty-one years. (Salzman Dep. at 16, 54, 56). At a minimum, Ms. Salzman became a twenty pack-year smoker in 1976. Mr. Slivak has been smoking at least one to two packs per day since he was approximately 15 years old—39 years ago. At a minimum, Mr. Slivak became a twenty pack-year smoker in 1978. (Slivak Dep. at 9-11). Mr. Barnes has been smoking a pack of cigarettes per day since approximately 1970. (Barnes Dep. at 111, 124). Thus, Mr. Barnes became a twenty-pack year smoker in 1990. Finally, Ms. Potts has been smoking at least one pack of cigarettes a day for the last 44 years. (Potts Dep. at 33). At a minimum, Potts became a twenty-pack year smoker in 1973.

Based on these facts, and without applying the discovery rule, the medical monitoring claims of these five plaintiffs are barred by the two year statute of limitations. For example, Ms. Rodweller had approximately two years from the end of 1970 to bring her medical monitoring claim. Ms. Salzman had until the end of 1978 to bring her claim. Mr. Slivak had until the end of 1980. Ms. Potts should have filed her claim by no later than the end of 1975, and Mr. Barnes, who came nearest to satisfying the statute of limitations, should have filed his claim by the end of 1992. Under a pure statute of limitations analysis, these five plaintiffs' claims are barred by the statute of limitations because they waited until 1996 to file their claims for medical monitoring.[15] Even if this Court applied the discovery rule, the claims of these five plaintiffs would be barred.

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[15] Courts in this Circuit have long held that general references to the time when a claim accrued, as long as that time was outside the statute of limitations period, are sufficient to bar a claim as a matter of law. See Kichline, 800 F.2d at 357; Czyzewski v. Consolidated Rail Corp., No. CIV.A.96-3716, 1997 WL 9791 (E.D.Pa. Jan.9, 1997); Souders v. Atlantic Richfield Co., 746 F.Supp. 570 (E.D.Pa.1990).

The discovery rule tolls the statute of limitations to reflect the "plaintiff's complete inability, due to facts and circumstances not within his control, to discover an injury despite the exercise of due diligence." Kingston, 690 A.2d at 288. Thus, to the extent these five plaintiffs were unable to discover their injury due to facts not within their control, the Court will apply the discovery rule. Under the discovery rule, the statute of limitations begins to run when the "plaintiff knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct." Bradley, 633 A.2d at 194. The plaintiff has the burden of proving that he exercised reasonable diligence in bringing his claim. Reasonable diligence is "an objective, rather than a subjective standard. Under this standard, the plaintiff's actions must be evaluated to determine whether he exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." Cochran, 666 at 249.

Applying these principles to the facts of this case, the Court finds that each of these five plaintiffs knew, or should have known, that smoking cigarettes put him or her at a significantly increased risk of contracting a serious latent disease years before they filed the instant suit. Thus, the medical monitoring claims of these five plaintiffs are barred by the statute of limitations. When a Court is asked to apply the discovery rule, the relevant question posed is whether an ordinary person, exercising reasonable diligence, would have known or should have known of his injury and its cause. In this case, each plaintiff should have known or did know that smoking caused them to be placed at an increased risk of contracting a serious latent disease.

Since the 1980s, every doctor seen by Mr. Barnes for hypertension has told him to stop smoking. (Barnes Dep. at 92).

Dr. Brownstein, his doctor in the mid-1980s, took Barnes' cigarettes and threw them away every time Barnes came in for a visit. Id. at 35-36. Indeed, Mr. Barnes stated that at the time of these visits in the 1980s, he "kn[e]w that cigarettes are no good for you if you have any type of lung disease." (Barnes Dep. at 36). Further, Mr. Barnes stated that he believed that his father's death from lung cancer was partially caused by smoking. (Barnes Dep. at 128-29). Finally, Mr. Barnes testified at deposition that none of the warnings on cigarettes, which inform smokers of the risks of smoking, provided him with any information that he already did not possess. (Barnes Dep. at 156-57). Based on these facts, it is obvious that Barnes knew that smoking caused him to be placed at an increased risk of contracting a serious latent disease by at least the mid-1980s. Because Mr. Barnes knew of his injury and its cause, Barnes should have filed suit for his medical monitoring claim by the end of 1992, which he failed to do. Thus, his claim is time-barred.

Ms. Potts has likewise known for years that smoking put her at an increased risk of contracting a serious latent disease. By her own admission, Potts learned "for sure" that cigarette smoking created an increased risk of disease in 1966, when the Surgeon General's first warnings were put on cigarette packages.[16] In addition, and more importantly, Ms. Potts was in-

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[16] To the extent that plaintiffs' raise a "reverse preemption" argument, this Court rejects such an argument. The "reverse preemption" doctrine, first discussed in Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir.1990), aff'd in part, rev'd in part, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), had nothing whatsoever to do with notice or statute of limitations issues. Instead, in Cipollone, the defendants were prevented from affirmatively using plaintiff's knowledge of cigarette warning labels to establish comparative negligence under the New Jersey Comparative Negligence Act on a

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formed by her cardiologist in the late 1980s that she was at a significantly increased risk of contracting heart disease, in the form of clogged arteries, from smoking. (Potts Dep. at 95-97). In fact, she has already been informed that she has contracted such heart disease. Id. Ms. Potts also was told by her doctors in 1991 that "she needs to stop smoking due to the fact that [her vocal cord problem] could become a malignant problem." (Defs.' Mot. Summ. J. Statute Limitations Ex. 11). It is clear from her own testimony that Ms. Potts knew that smoking placed her at a serious risk of disease in 1966 and continuously through the 1980s and 1990s. Even assuming that the discovery rule tolled Ms. Potts' claim until 1991, when her doctors told her that her vocal cord problem could become malignant, Ms. Potts' medical monitoring claim is still untimely.

Ms. Rodweller has known since the late 1950s or early 1980s that smoking created an increased risk of contracting a serious latent disease. Ms. Rodweller first learned the danger of smoking from her doctors. As early as 1959, for instance, Rodweller was told by a doctor that smoking would put scar tissue on her vocal cords and it was in that year that she realized that "cigarettes affected [her] body." (Rodweller Dep. at 120,

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[16] (continued)

duty to warn claim. Id. at 555-59. At no point did the Third Circuit in Cipollone hold that a plaintiff's post-warning knowledge could not be introduced by the defendant for any purpose. To the contrary, the court held that this knowledge was relevant to whether the plaintiff had mitigated her damages. Thus, plaintiff's reliance on the reverse-preemption doctrine is misplaced and plaintiffs' knowledge of the warnings remains relevant to the statute of limitations. However, even if the Court did not consider plaintiff's knowledge of the warning labels, plaintiffs still would possess the requisite knowledge of their injury and its cause so that their claims would still be time-barred.

200-01). Since this time, Ms. Rodweller admits that all of her doctors have advised her to quit smoking because "[i]t can make [her] ill" and because "[she] was a good candidate for emphysema." (Rodweller Dep. at 151). In addition, Ms. Rodweller knew in 1985 that pleurisy, a severe chronic lung disorder, was associated with cigarette smoking, and she told her daughter that it could happen to her if she did not stop smoking. (Hand Dep. at 23-25). Based on Ms. Rodweller's own sworn testimony, it is clear that at a minimum, Ms. Rodweller knew of, or should have known, that cigarett e smoking placed her at an increased risk of contracting a serious latent disease. Thus, Ms. Rodweller's claim is time-barred.

Ms. Salzman also knew long ago that smoking significantly increased her risk of contracting a serious latent disease. In the 1980s, one of Salzman's doctors told her to stop smoking. The doctor explained, "it's really bad for you, you can get emphysema, cancer." (Salzman Dep. at 34). This information was confirmed by two separate anesthesiologists. (Salzman Dep. at 30-31). In addition to being directly told by her doctors that she could contract these diseases, Ms. Salzman urged her son, throughout the 1980s, to quit smoking because of the dangers of smoking. (Richard Salzman Dep. at 47; Arthur Salzman Dep. at 74-75). Furthermore, Ms. Salzman attended a "Smokers Enders Program" in the 1980s because she wanted to quit due to the risks of smoking. (Salzman Dep. at 146). From these facts, a reasonable juror could not otherwise conclude that Ms. Salzman knew of the risks of contracting a serious latent disease from smoking as early as the mid-1980s. Hence, her medical monitoring claim is time-barred.

Finally, Mr. Slivak similarly believed years ago that smoking significantly increased his risk of contracting a serious latent disease. After 1985, Mr. Slivak had read the warnings on the packages of cigarettes. (Slivak Dep. at 34-35). In addition,

in th e early 1980s, Slivak discussed with his family that smoking may have been the cause of his wife's cancer. (Slivak Dep. at 30-31). More importantly, Slivak's doctors connected smoking to his heart disease. In the 1980s, three or four separate physicians told Slivak that smoking was part of the reason that he was experiencing heart troubles. (Slivak Dep. at 15-16). Further, during two separate hospital visits in 1989 and 1993, Slivak was instructed not to smoke by his doctors. (Slivak Dep. at 61-67). Finally, from 1982 to 1988, Slivak warned his daughter that smoking could cause cancer. (Steep Dep. at 18). Based on these facts, no reasonable juror could otherwise conclude that Mr. Slivak knew of the his injury—that he was at a significantly increased risk of contracting a latent disease—and its cause—smoking. Therefore, Mr. Slivak's medical monitoring claim is time-barred.

Plaintiffs advance one final argument against finding that the claims of these five plaintiffs are barred by the statute of limitations. Plaintiffs contend that the statute of limitations should not be applied because their medical monitoring claims could not have been brought earlier due to the fact that medical monitoring is a relatively new cause of action. In disposing of this argument, the Court first notes that this argument directly contradicts plaintiffs' argument that this claim can be certified because it is not an immature tort. Second, several Pennsylvania cases in the 1980s discussed the common law cause of action for medical monitoring. See Peterman v. Techalloy Co., Inc., 29 Pa. D. & C.3d 104 (Montgomery County C.C.P.1982); Habitants Against Landfill Toxicants v. City of York, No. CIV.A.84-S-3820, 1985 WL 19991 (York County C.C.P. May 20, 1985). And the federal district courts in Pennsylvania have been adjudicating medical monitoring claims since the early 1980s. See In re Three Mile Island Litig., 87 F.R.D. 433 (M.D.Pa.1980); Linkous v. Medtronic, Inc., No. CIV.A.84-1909, 1985 WL 2602 (E.D.Pa. Sept.4, 1985); Villari v. Terminix Int'l, Inc., 663 F.Supp. 727

(E.D.Pa.1987). Finally, in 1990 the Third Circuit explicitly cited this authority and unambiguously stated, "We agree with Merry [v. Westinghouse Elec. Corp., 684 F.Supp. 847 (M.D.Pa.1988)], and predict that the Supreme Court of Pennsylvania would follow the weight of the authority and recognize a cause of action for medical monitoring." In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir.1990) ("Paoli I"). Paoli I was handed down six full years before the plaintiffs, here, filed their complaint; thus, even if the Court were to toll the plaintiffs' statute of limitations until Paoli I was handed down, the claims of the five plaintiffs discussed above would still be time-barred.

In sum, the Court will grant in part and deny in part defendants' motion for summary judgment based on the statute of limitations. The motion is denied to the extent that defendants seek summary judgment against Ms. McNally; it is, however, granted to the extent that they seek summary judgment against William Barnes, Catherine Potts, Norma Rodweller, Barbara Salzman and Edward Slivak.

IV. Affirmative Defenses

Defendants also move for summary judgment against Ciaran McNally, William Barnes and Catherine Potts on the grounds that their claims are barred by the affirmative defenses of contributory negligence, assumption of risk and consent to exposure to a hazardous substance.[17] Because summary judgment has been entered against Mr. Barnes and Ms. Potts, the Court will only consider defendants' arguments against Ms.

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[17] Although defendants do not agree that plaintiffs can proceed on theories of intentional tort or strict liability under a medical monitoring claim, defendants assume for the purposes of this motion that plaintiffs can proceed on these theories.

McNally. In this regard, defendants argue that Ms. McNally knew, before she began smoking cigarettes on a regular basis, that smoking cigarettes significantly increased her risk of contracting a serious latent disease. Defendants also claim that the undisputed facts of the record also establish that, well before making any serious effort to quit smoking, Ms. McNally knew that smoking cigarettes significantly increased her risk of contracting a serious latent disease. Based on these reasons, defendants contend that Ms. McNally's claim is barred by the doctrines of contributory negligence, assumption of risk and consent.

In response, plaintiff[18] rejoins that none of these defenses bar her medical monitoring claim for the following reasons. First, the defenses of contributory negligence, assumption of risk and consent are barred by the equitable doctrine of unclean hands. Second, the defenses of contributory negligence, assumption of risk and consent are inapplicable to the facts of this action and unavailable to the defendants. Third, public policy prohibits assertion of contributory negligence, assumption of risk and consent under the circumstances of this case.

To begin, plaintiff urges this Court to exercise its equitable powers to bar defendants from asserting its affirmative defenses because of defendants' intentional and fraudulent conduct towards plaintiffs. (Pls.' Br. at 2, 70- 74). The Court, however, will not do so. Plaintiff, first, cannot argue that defendants have engaged in fraudulent conduct because she has dropped any fraud counts from the complaint. In addition, plaintiffs' counsel represented to this Court during the class

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[18] Because the Court has already held that summary judgment will be entered against five of the six plaintiffs, the Court will use the word "plaintiff" to refer solely to Ms. McNally.

certification hearing that plaintiffs do not assert a fraud or misrepresentation claim: "We never said misrepresentation. We don't have a fraud or misrepresentation count in this Complaint. The law in Pennsylvania is not good on a class-wide basis for that particular issue. The law is relatively clear, for example, under our consumer protection statute that individual issues of reliance when you talk about advertising, that those issues are individual." (Transcript of Proceedings dated March 6, 1997 at 16-17). Because plaintiffs have chosen not to maintain fraud claims, in order to increase their chances of succeeding on the class certification issue, the plaintiffs cannot now reintroduce these claims under the guise of mere factual allegations. Thus, the Court cannot bar defendants from asserting affirmative defenses on the grounds that they have acted fraudulently because fraud, simply put, is not part of the case anymore.

Further, it is law as set forth by both the United States Supreme Court and the Pennsylvania Supreme Court that the equitable doctrine of unclean hands may be applied only against one seeking equitable relief. The unclean hands doctrine is based upon the age-old maxim that "he who comes into equity must come with clean hands." A court may not, however, use its equitable powers to deprive defendants of a legal right to which they would otherwise be entitled in an action at law. The theories asserted by plaintiff in this present action, i.e., negligence, strict liability and intentional tort, to support their claim for equitable relief, are legal, not equitable, theories. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, §§ 28, 98, 105 (5th ed.1984). Indeed, plaintiff acknowledges that the affirmative defenses set forth by defendants are "legal defenses." (Pls.' Br. at 72).

It is well-settled that a party may assert both equitable and legal defenses in an action in equity. See Liazis v. Kosta, Inc., 421 Pa.Super. 502, 618 A.2d 450 (1992). In the seminal case of

Manufacturers' Finance Co. v. McKey, 294 U.S. 442, 55 S.Ct. 444, 79 L.Ed. 982 (1935), the United States Supreme Court, quoting in part the Pennsylvania Supreme Court, held that a court in equity could not deprive a party of its legal rights based on the unclean hands doctrine or the related maxim "he who seeks equity must do equity." The Manufacturers court stated:

> The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right ... under controlling state law does not authorize that court to modify or ignore the terms of the legal obligations upon the claim, [just] because the court thinks, that these terms are harsh or oppressive or unreasonable. A party may stand upon the terms of a valid contract in a court of equity as he may in a court of law. "If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity." The petitioner here did not seek equitable relief. It sought an enforcement of its legal rights; and, as said by the Supreme Court of Pennsylvania, "Legal rights are as safe in chancery as they are in a court of law, and, however strong an appeal may be to the conscience of a chancellor for equitable relief, he is powerless to grant it if the one from whom it must come will be deprived of a legal right." Colonial Tr. Co. v. Central Tr. Co., 243 Pa. 268, 276, 90 A. 189, 191 [(1914)]. The maxim "he who seeks equity must do equity" presupposes that equitable, as distinguished from legal, rights, substantive or remedial, have arisen from the subject-matter in favor of each of the parties; and it requires that such

> rights shall not be enforced in favor of one who affirmatively seeks their enforcement except upon condition that he consent to accord to the other his correlative equitable rights.

Id. at 448-49, 55 S.Ct. at 447 (citations omitted) (emphasis added). In deciding whether the District Court could invoke its equitable powers to strip the petitioner of its legal rights, the Supreme Court, in reversing the lower court, stated that:

> As already appears from what has been said, the decrees below rest wholly on the untenable assumption that petitioner's rights are subject to denial or curtailment in virtue of equitable principles applicable only against one who affirmatively has sought equitable relief; and here that was not the case. The question, or extent, of petitioner's legal rights, relieved of this assumption, has been neither determined nor considered upon the facts or the applicable law.

Id. at 453, 55 S.Ct. at 449. Based on the Supreme Court's reasoning in Manufacturers', it is clear that a court, sitting in equity, cannot invoke its equitable powers to strip a party of its legal rights, whether these rights be claims or defenses.

The Pennsylvania courts have also followed Manufacturers' holding that a party's legal rights may not be precluded by a court sitting in equity. The Supreme Court of Pennsylvania cited Manufacturers' with approval in Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 244 A.2d 10 (1968). In Moon Motor, the Supreme Court stated, in declining to apply the unclean hands doctrine to deny plaintiff a legal right, that:

> [A]lthough it has been said that the clean hands

> doctrine applied in courts of law as well as in courts of equity, it generally has been held that the doctrine operates only to deny equitable, and not legal, remedies. The plaintiff in this case was granted, not a special equitable remedy, but only a money decree. In effect, Universal received what it would have if the action had been at law in assumpsit. We are not persuaded that the clean hands doctrine should be applied to deny plaintiff this legal right.

Universal Builders, 430 Pa. at 555-56, 244 A.2d 10 (emphasis added). See also Houghten v. Restland Memorial Park, 343 Pa. 625, 23 A.2d 497 (1942) (holding that a court of equity cannot deprive a party of its legal rights).

The lessons from these cases are two-fold. First, legal defenses do not become equitable defenses simply because they are asserted in an action in equity. Second, equitable principles such as the doctrine of unclean hands may not be used to deprive a defendant of legal rights—remedies or defenses. Applying these lessons, the Court finds that defendants have a legitimate right to raise the legal defenses of contributory negligence, assumption of risk and consent.[19] Therefore, the Court cannot exercise its equitable powers to deprive defendants of their legal rights. In addition, as this Court has noted supra and by way of prior order, this case is not purely an equitable action; indeed, it

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[19] The Court recognizes that consent and assumption of risk are technically not defenses in that a plaintiff must prove lack of consent as part of his intentional tort and that the assumption of risk analysis, under Pennsylvania law, may more properly be characterized as part of the duty analysis. However, for the purposes of this section of the memorandum, the Court will refer to consent and assumption of risk as affirmative defenses.

implicates both legal and equitable rights. Thus, it would be even less appropriate for this Court to exercise its equitable powers to bar defendants from asserting it affirmative, legal defenses. Thus, the Court will not do so.

The Court also will not exercise its inherent equitable powers to bar defendants' affirmative defenses based upon consideration of public policy. The law as expressed by the United States Supreme Court in Manufacturers' makes it clear that a court cannot utilize its equitable powers to deny parties their legal rights under controlling state law regardless of how strong an appeal is made to the conscience of the court. See Manufacturers', supra. Indeed, the affirmative defenses of contributory negligence, assumption of risk and consent are the product of public policy developed over centuries and remain the law in the Commonwealth of Pennsylvania. In the face of the substantial public policy reasons for allowing defendants to assert affirmative defenses, plaintiff must come forward with substantial public policy reasons and authority to support the extraordinary position that this Court should deprive defendants of their legal rights. Plaintiff has failed in this regard; indeed, she cited no cases to support her position.

In contrast to plaintiff's position, the Supreme Court of Pennsylvania has stated:

> Even recognizing that a court of equity has broad powers, "[i]t is a mistake to suppose that a court of equity is amenable to no law, either common or statute, and assumes the rule of an arbitrary legislator in every particular case," Blackstone's Commentaries on the Law 732 (B. Gavit ed. 1941). When the rights of a party are clearly established by defined principles of law, equity should not change or unsettle those rights. Equity follows the law.

First Federal Sav. & Loan Ass'n of Lancaster v. Swift, 457 Pa. 206, 210, 321 A.2d 895, 897 (1974). It has also been said that "a court of equity follows and is bound by rules of law, and does not use equitable considerations to deprive a party of his righ ts at law." Bauer v. P.A. Cutri Co. of Bradford, 434 Pa. 305, 310, 253 A.2d 252, 255 (1969). "It is certainly not true that a chancellor in equity has the boundless discretion to do as he sees fit. Rather, it is well-established that a chancellor in equity must follow clearly fixed and established principles of law." Wade v. S.J. Groves & Sons Co., 283 Pa.Super. 464, 472, 424 A.2d 902 (1981).

Applying these principles here, the Court concludes that it would be inappropriate to deprive defendants of their affirmative, legal defenses. Indeed, the law of Pennsylvania and the United States Supreme Court clearly holds that no matter the appeal to the conscience of the chancellor, a court in equity cannot deprive a party its entitlement to its legal rights. Although this Court recognizes that important public policy considerations are implicated by plaintiff's claim, counterbalanced against these interests are those public policy considerations that have long formed the bedrock upon which defendants' affirmative defenses rest. In light of the many cases cited above, which form an important thread of our equity jurisprudence, this Court will not, and cannot, properly deprive defendants of their legal rights. Once a Court assumes the authority to deprive litigants of their well-established and cherished legal rights, the central principles of our judicial system— impartiality and neutrality—are forever weakened. This Court will not assist in this endeavor.

Because defendants are entitled to assert their affirmative defenses, the Court must now decide whether defendants are entitled to summary judgment against Ms. McNally on their affirmative defenses. The first defense raised by defendants is that of contributory negligence; the Court thus turns to this issue.

As a threshold question, and in order to resolve a dispute of the parties, the Court must decide whether comparative or contributory negligence will apply to this case. Looking to guidance from the courts of Pennsylvania, this Court finds that this issue has never been addressed. Thus, this Court, as a court sitting in diversity and applying Pennsylvania law, must predict how the Pennsylvania Supreme Court would rule. The Pennsylvania Comparative Negligence Act, 42 Pa. Cons.Stat. Ann. § 7102(a), by its express language is applicable only to "actions brought to recover damages for negligence resulting in death or injury to person or property...." In their Second Amended Complaint, the plaintiffs do not seek damages, but rather a court-supervised monitoring program to detect serious latent diseases for which plaintiffs are at a significantly increased risk as a result of smoking the defendants' cigarettes. Moreover, both the defendants and plaintiffs are alleged to have been negligent. From these facts, it appears that contributory negligence would apply in lieu of comparative negligence. Commonwealth Federal Sav. & Loan Assoc. v. Pettit, 137 Pa.Cmwlth. 523, 586 A.2d 1021 (1991).

Despite this appearance however, the Court finds that if the Supreme Court of Pennsylvania was presented with this issue, it would find that the nature of a medical monitoring claim brings it within the purview of the Comparative Negligence Act. A close review of the nature of a medical monitoring claim indicates that this claim is exactly the type of claim that normally would be covered by the Comparative Negligence Act. Indeed, the Pennsylvania Supreme Court has acknowledged that the basis of a medical monitoring claim is medical examination tests necessary to detect future onset of physical harm. Redland Soccer, 696 A.2d 137. In order to prove an entitlement to medical monitoring, a plaintiff must prove negligence on the part of defendant. The Supreme Court of Pennsylvania has also stated that, under medical monitoring, plaintiffs may seek monetary

damages. From these observations, it is clear that a medical monitoring claim that requests lump sum damages would qualify as an "action[ ] brought to recover damages for negligence resulting in death or injury to person or property...."

The only aspect that would take a medical monitoring claim out of the Comparative Negligence Act is the fact that a plaintiff can seek equitable relief under his or her medical monitoring claim. Indeed, the plaintiffs here have sought equitable relief. However, the question which arises is whether a plaintiff should be subjected to the harsh doctrine of contributory negligence when he exercises his right to seek equitable relief in lieu of monetary damages under a medical monitoring claim. This Court thinks not.

The Pennsylvania Supreme Court has expressly encouraged the use of medical monitoring funds in Pennsylvania because of their advantages over lump- sum damages. Id. at 142 n. 6. In Redland Soccer, the Supreme Court noted the advantages of using a fund, as opposed to awarding monetary damages, including the trial court's ability to administer the fund, to ensure that plaintiffs' use the money for testing, and to control the cost to defendants. Id. Clearly, the Supreme Court was encouraging the use of funds over monetary damages because of these advantages. However, if courts were to apply the anachronistic doctrine of contributory negligence to bar plaintiffs from recovering under their medical monitoring claims, then plaintiffs would be discouraged from requesting the relief of a medical monitoring fund. This result would be contrary to the result that the Redland Soccer court intended. Thus, for these reasons, this Court finds that the Supreme Court of Pennsylvania would not apply the doctrine of contributory negligence to medical monitoring claims, but rather it would apply the Comparative Negligence Act. The application of the Comparative Negligence Act to these claims would more properly advance the goals of the

Redland Soccer court, and would also a dequately protect the rights of defendants. With this said, the Court turns to the question of whether Ms. McNally was comparatively negligent.

In the instant case, if defendants can be deemed negligent for exposing plaintiffs to cigarettes, then plaintiff, who knew or should have known of the increased risks of contracting serious latent diseases due to smoking, yet proceeded to smoke cigarettes, should be deemed to be negligent herself. Thus, the question posited is whether Ms. McNally, the remaining plaintiff, either knew or should have known of the increased risk of contracting a serious latent disease from exposure to cigarettes. The Court finds that a genuine issue of material fact exists with respect to this issue. Although evidence exists that indicates that Ms. McNally knew that cigarettes were "bad" or "dangerous" in a general sense, there simply does not exist enough evidence on the record that would suggest that she knew or should have known, as a matter of law, that smoking placed her at a significantly increased risk of contracting a serious latent disease. Thus, the motion is denied to the extent it seeks judgment on negligence grounds.

The assumption of risk doctrine is applicable to both negligence and strict liability claims.[20] In a negligence action,

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[20] The Court notes that the assumption of risk doctrine is currently undergoing some major changes in the Commonwealth of Pennsylvania. In Howell v. Clyde, 533 Pa. 151, 620 A.2d 1107 (1993), the Supreme Court indicated that, if the plaintiff's assumption of risk is established as a matter of law, then the defendant is deemed to have owed no duty to the plaintiff to protect him or her from harm in the first instance. In that context, assumption of risk, is no longer "a defense," but rather simply obviates the defendant's duty. Whatever the current state of law in Pennsylvania with respect to assumption of risk, for the purposes of this motion, the "duty" distinction is irrelevant.

where the plaintiff was aware of a risk and faced it voluntarily, the defendant is relieved of his or her duty to protect the plaintiff from such risk. Howell, 533 Pa. at 162-63, 620 A.2d 1107. The essential elements of the assumption of risk doctrine are the plaintiff's subjective understanding of the risk, voluntary choice to encounter the risk, and willingness to accept that risk. See Barrett v. Fredavid Builders, Inc., 454 Pa.Super. 162, 685 A.2d 129 (1996). In a negligence action, the assumption of risk analysis is a question of law for the court, and is not for the jury. Howell, 533 Pa. at 162-63, 620 A.2d 1107. If the court determines that assumption of risk is inapplicable, the jury is to be charged only as to comparative negligence. Id. at 163, 620 A.2d 1107. In a strict liability action, however, the plaintiff's assumption of risk is an affirmative defense to liability and may proceed to the jury where there is a dispute of material fact. See Kupetz v. Deere & Co., Inc., 435 Pa.Super. 16, 644 A.2d 1213 (1994).

To prove assumption of risk in either the negligence or strict liability context, the evidence must demonstrate that the plaintiff subjectively knew of the risk and deliberately proceeded to act in spite of it. Barrett, 685 A.2d at 131. However, the app lication of this doctrine is very narrow. A defendant must show that the "nature and extent" of the risk were "fully appreciated" and that the plaintiff voluntarily proceeded to face that risk. Childers v. Power Line Equip. Rentals, Inc., 452 Pa.Super. 94, 681 A.2d 201, 208 (Pa.Super.1996). "It is well established in Pennsylvania that the assumption of the risk defense requires knowledge of the specific defect eventually causing injury and the voluntary use of the product with knowledge of the danger caused by the specific defect." Dougherty v. Royal Zenith Corp., 1991 WL 151913 (E.D.Pa. Aug. 1, 1991) (citation omitted). Accordingly, in order to preclude a plaintiff from recovering because he assumed the risk, the defendant must establish that plaintiff had knowledge of and appreciation of the precise risk involved.

Applying these principles to the record here, the Court finds that defendants have been unable to establish that they are entitled to summary judgment against Ms. McNally. Ms. McNally alleges that defendants engaged in various conduct which she did not have the ability to appreciate, nor even have knowledge about. As such, she claims that she cannot be precluded from asserting her claim due to assumption of risk. The Court agrees. Defendants simply have not produced evidence, at the summary judgment, that would establish that plaintiff assumed the specific risk and appreciated this risk.

Conversely, the Court also rejects plaintiffs' argument, that no person could have ever assumed the risks associated with cigarette smoking due to defendants' conduct. Plaintiff argues that defendants engaged in all types of untoward conduct and that this conduct was concealed, and as such, she could have never assumed the specific risk. However, on the record before this Court, it is not entirely clear that defendants ever engaged in this conduct; and if they did engage in this conduct, it is not clear whether plaintiff could not have had knowledge of this particular risk and appreciated and confronted it. In sum, the Court finds that the issue of assumption of risk is a question for the jury with respect to plaintiff's strict liability theory, and that the issue of assumption of risk with respect to plaintiff's negligence theory must be reserved.

The Court now turns to defendants' consent argument. In plaintiffs' Second Amended Complaint, plaintiffs allege that defendants intentionally exposed them to hazardous substances. Under Pennsylvania law, claims for intentional exposure to hazardous substances are predicated on a theory of battery. Field v. Philadelphia Electric Co., 388 Pa.Super. 400, 565 A.2d 1170, 1178 (1989). To establish an intentional tort claim under a battery theory, the plaintiff must prove, as an essential element of her claim, that she did not consent to the tortious conduct. See

Levenson v. Souser, 384 Pa.Super. 132, 146, 557 A.2d 1081, 1088 (1989), alloc. denied, 524 Pa. 621, 571 A.2d 383 (1989). Thus, in reality, consent is an element of plaintiff's claim as opposed to a true affirmative defense. See Keeton, supra, § 18.

Express consent may be given by words or affirmative action and implied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur. Id. at 130 (citing Restatement (Second) Torts § 892 cmt. b & c). Consent to an intentional tort is comparable to assumption of risk under negligence principles. See Restatement § 892A cmt. a. "One who effectively consents to the conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for the harm resulting from it." Restatement § 892A(1). "Consent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties, however harmful it might be to the interests of others." Keeton, supra, at 113.

As with assumption of risk and its requirement that the plaintiff know, appreciate and accept a particular risk, the defense of consent is conduct specific. Restatement (Second) of Torts § 892 cmt. a. In order to be barred because of consent, plaintiff must have consented to the defendant's conduct, not just the harm that followed. Id. at cmt. e. In addition, a plaintiff's consent to one aspect of a defendant's conduct will not insulate a defendant from liability for other acts. A plaintiff may be held to have consented to only certain conduct, but to have withheld consent with respect to other conduct. See, e.g., McCabe v. Village Voice, Inc., 550 F.Supp. 525, 529 (E.D.Pa.1982). Conduct in excess of that consented to is not protected by the consent actually given. Id.

In this case, defendants argue that no reasonable fact finder could dispute that Ms. McNally voluntarily chose to use

a legal product replete with warnings by the Surgeon General concerning the dangers of using said product. Defendants claim that Ms. McNally knew that cigarette smoking could pose a substantial risk of contracting a latent disease, but despite this knowledge, she consented voluntarily to such exposure by beginning to smoke cigarettes on a daily basis and later continuing to smoke cigarettes , making little or no effort to try to quit smoking for the majority of her "smoking life." For these reasons, defendants contend that Ms. McNally consented to any exposure to cigarettes.

Although this argument is persuasive, Ms. McNally contends that she could not have consented to exposure to defendants' cigarettes because she lacked the crucial information about the nature of the product. Plaintiff argues that defendants withheld information from her—evidence that many of the risks are not inherent, including evidence that the addictiveness and ill health effects of cigarettes are the result of deliberate industry decisions to increase the risk of harm through additives and manipulation of nicotine, to withhold safer and less addictive alternatives—which precludes defendants from claiming that she consented to exposure to the hazardous substances in cigarettes.

In light of plaintiff's allegations, the Court must deny defendants' motion for summary judgment on consent grounds because there exists genuine issues of material fact. A factual question exists as to whether defendants engaged in certain conduct and as to whether Ms. McNally was aware of this conduct. If defendants did engage in the alleged conduct, and Ms. McNally was unaware of this conduct, then defendants cannot claim that Ms. McNally consented to defendants' allegedly intentional conduct that exposed Ms. McNally to hazardous substances.

In sum, the Court must deny defendants' summary judgment concerning plaintiffs' contributory negligence, assumption of risk and consent to exposure to hazardous substances because there exists genuine issues of material fact.

V. Medical Monitoring

Defendants also argue that summary judgment should be entered in their favor on plaintiffs' medical monitoring claim. Defendants argue that they are entitled to summary judgment for at least four reasons. First, the opinions offered by plaintiffs' medical monitoring experts in support of the proposed medical monitoring program do not meet the requirements for admissibility under Rule 702 of the Federal Rules of Evidence. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Second, plaintiffs' proposed testing cannot be found "reasonably necessary" under Pennsylvania law where their experts concede that the proposed monitoring is contrary to accepted medical practice. Third, plaintiffs cannot meet their burden of establishing entitlement to medical monitoring because their experts have not assessed the medical history and condition of any plaintiff and therefore cannot give opinions that monitoring is either necessary for any plaintiff or would not be prescribed if the plaintiffs did not smoke. Fourth, undisputed evidence relating to each plaintiff negates plaintiff's entitlement to medical monitoring, in whole or in part.

Of course, plaintiffs ask this Court to deny defendants' motion, claiming it lacks any merit. Specifically, plaintiffs first argue that defendants' motion should be denied because it is contingent on the exclusion of plaintiffs' expert testimony. Plaintiffs assert that their proposed medical monitoring program is designed to monitor a high risk population for three diseases

and that this program is properly aimed at detection, not prevention or treatment, and must be evaluated in light of this objective. From this point of view, plaintiffs submit that the early diagnosis of the diseases to be screened will provide a benefit to plaintiffs even if the diseases cannot be prevented or cured at this time.

Finally, plaintiffs argue that genuine issues of material fact exist which preclude the entry of summary judgment. In this regard, plaintiffs explain that plaintiffs' proposed medical monitoring program is different from general medical screening normally recommended for persons who are at high-risk for smoking related diseases. In addition, plaintiffs argue that it is not necessary that they establish on an individual basis that their medical monitoring program would be different from that normally recommended. Plaintiffs further contend that their proposed medical monitoring program is reasonably necessary because it provides a means of disease detection. In sum, plaintiffs conclude that the elements challenged by defendants in their motion involve factual determinations to be made by the trier of fact.

Because the Court has stated that it will grant summary judgment in favor of defendants and against five of the plaintiffs, and because the Court finds that Ciaran McNally cannot satisfy the elements of Redland Soccer, the Court will turn directly to defendants' final argument that the undisputed evidence relating to Ms. McNally negates her entitlement to medical monitoring[21].

Under the Burns Program, Ms. McNally is only entitled to participate in the first level of the proposed medical monitor-

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[21] Although the Court believes that defendants have raised other meritorious arguments in their motion, the Court, in the interests of efficiency and economy, will not address these arguments.

ing program. Under the first level, Ms. McNally would be entitled to receive, annually or bi-annually, a physical examination, cardiovascular risk assessment and an EKG. However, Ms. McNally herself does not seek monitoring in the form of an EKG. (Defs.' Mot. Summ. J. Medical Monitoring Ex. 1 Pls.' Resp. Interrog. 10). Thus, the only monitoring that Ms. McNally seeks, and would be qualified for under the Burns Program, is a physical examination and cardiovascular risk assessment.

Defendants argue that Ms. McNally is not entitled to this testing because the sixth element of Redland Soccer requires her to prove that the proposed medical monitoring regime "is different from that normally recommended in the absence of the exposure." Redland Soccer, 696 A.2d at 146. Defendants argue that Ms. McNally is clearly not entitled to the physical examinations and cardiovascular risk assessment because it is recommended that the entire adult population receive these tests.[22]

Because annual physical examinations and cardiovascular risk assessment are routinely recommended to all persons in the absence of exposure, the Court finds Ms. McNally can not establish that "the prescribed regime is different from that normally recommended in the absence of the exposure." Id. The sixth element of the Redland Soccer test "mirrors the Third Circuit's requirement" in In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 718 (3d Cir.1994) ("Paoli II "), that the monitoring regime be "different than the one that would have been pre-

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[22] It is noted that defendants made this argument as to each and every plaintiff; however, because the Court has already stated that it will enter summary judgment against the other plaintiffs due to the statute of limitations, the Court will only address defendants' argument as it relates to Ms. McNally.

scribed in the absence of the particular exposure." Barnes v. American Tobacco Co., 176 F.R.D. 479 (E.D.Pa.1997) (quoting Paoli II, 35 F.3d at 788 n. 53). The substance of this requirement is to ensure that "a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff." Redland Soccer, 696 A.2d at 144 (quoting Paoli II, 35 F.3d at 788).

Here, Ms. McNally only seeks monitoring for two tests which would be recommended for her even if she did not smoke. Any increase in Ms. McNally's incremental risk of incurring the harm produced by the allegedly hazardous substances in cigarettes would not warrant a change in the medical monitoring that would be prescribed for her. Indeed, in the absence of exposure, it would be recommended that she receive the tests she seeks under her medical monitoring claim. Thus, she cannot satisfy the sixth element of Redland Soccer.

Plaintiffs argue that summary judgment is not appropriate on this ground because the medical monitoring program that they advance is sufficiently different from one that they would receive in the absence of exposure. In Redland Soccer, plaintiffs' expert suggested a plan which consisted of eight different examinations, each of which was "not out of the ordinary," but consistent with the battery of tests generally recommended for the populations at risk for adult cancer. Redland Soccer, 696 A.2d at 146. The court held that a program had to be evaluated as a whole, including the various categories of individuals for whom the testing was proposed and the full spectrum of tests proposed. Id. The Court was not persuaded that the "ordinary" nature of the individual tests, nor their general usefulness in detecting the diseases at issue, defeated plaintiff's proof that the

prescribed program was different from that normally recommended in the absence of exposure. Id. at 147. The Court thus denied defendant's motion for summary judgment, explaining that it was for the trier of fact to determine whether plaintiffs have satisfied each element of their medical monitoring claim.

However, this reasoning from Redland Soccer is simply inapplicable to the facts of the case now before this Court. When plaintiffs, as a whole advanced this argument initially, it was based on the fact that some of the plaintiffs were entitled to seven different diagnostic tests under their proposed program. If all of the plaintiffs were not barred from prosecuting their claims, the Court would be able to find that plaintiffs' proposed program as a whole is "sufficiently different from that normally recommended in the absence of exposure to support a prima facie claim for medical monitoring and survive a motion for summary judgment." Id. However, because five of the six plaintiffs are time-barred from prosecuting their claims, no remaining plaintiff is entitled to any type of diagnostic testing that would not be recommended in the absence of exposure. Thus, because Ms. McNally only seeks medical monitoring for tests that would be recommended to all adults in the absence of exposure, the Court finds that Ms. McNally cannot satisfy the sixth element of Redland Soccer. Thus, the Court will enter summary judgment against Ms. McNally and in favor of defendants.

VI. Conclusion

Accordingly, for the foregoing reasons, this Court will deny defendants' motion for summary judgment concerning plaintiffs' contributory negligence, assumption of risk and consent to exposure to hazardous substances. The Court will grant in part and deny in part defendants' motion for summary judgment based on the statute of limitations. This motion will be

granted to the extent that defendants' seek summary judgment against William Barnes, Catherine Potts, Norma Rodweller, Barbara Salzman and Edward Slivak; the motion will be denied to the extent that defendants seek summary judgment against Ciaran McNally. The Court will grant in part and deny in part defendants' motion for summary judgment concerning plaintiffs' claims for medical monitoring. The motion will be granted to the extent that defendants seek summary judgment against Ciaran McNally, and the motion is denied as moot in all other respects.

An appropriate Order follows.

ORDER

AND NOW, this 17th day of October, 1997, upon consideration of the following Motions, and any responses thereto, and any replies thereto, it is hereby ORDERED that:

1. Defendants' Motion for Summary Judgment Concerning Plaintiffs' Contributory Negligence, Assumption of Risk and Consent to Exposure to Hazardous Substances is DENIED;

2. Defendants' Motion for Summary Judgment Based on the Statute of Limitations is GRANTED in part and DENIED in part. The Motion is granted to the extent that defendants' seek summary judgment against William Barnes, Catherine Potts, Norma Rodweller, Barbara Salzman and Edward Slivak; the Motion is denied to the extent that defendants seek summary judgment against Ciaran McNally. IT IS FURTHER ORDERED that JUDGMENT is ENTERED against William Barnes, Catherine Potts, Norma Rodweller, Barbara Salzman and Edward Slivak and in favor of defendants; and

3. Defendants' Motion for Summary Judgment Concerning Plaintiffs' Claims for Medical Monitoring is GRANTED in part and DENIED in part. The Motion is granted to the extent that defendants seek summary judgment against Ciaran McNally, and the motion is denied as moot in all other respects. IT IS FURTHER ORDERED that JUDGMENT is ENTERED against Ciaran McNally and in favor of defendants.

AND IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN R. ARCH, et al	:	CIVIL ACTION
	:	
v.	:	
	:	
THE AMERICAN TOBACCO COMPANY, INC., et al.	:	NO. 96-5903
	:	

ORDER

AND NOW, this 3rd day of June, 1997, upon consideration of plaintiff's Motion for class Certification, and defendants' response thereto, and plaintiffs' reply thereto, and the parties' post-hearing memoranda, and the parties' supplemental briefs, and the various exhibits in support of the aforementioned, and oral argument heard in open court at the class certification hearing held on March 6, 1997, it is hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.

Steven R. ARCH, et al.,

v.

THE AMERICAN TOBACCO COMPANY, INC., et al.

No. CIV. A. 96-5903.

United States District Court,
E.D. Pennsylvania.

June 3, 1997.

Stephen A. Sheller, Sheller, Ludwig, & Badey, Philadelphia, PA, Thomas E. Mellon, Jr., Mellon, Webster & Mellon, Doylestown, PA, Arnold Levin, Levin, Fishbein, Sedran & Berman, Philadelphia, PA, Sherrice A. Knisely, Sheller, Ludwig & Badey, Philadelphia, PA, Julia W. McInerny, Coale & Van Susteren, Washington, DC, Gary Robert Fine, Rodham & Fine, P.A., Fort Lauderdale, FL, Dianne M. Nast, Roda & Nast, P.C., Lancaster, PA, for Plaintiffs.

Edward F. Mannino, Wolf, Block, Schorr, & Solis-Cohen, Philadelphia, PA, Peter S. Greenberg, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, for The American Tobacco Company, Inc., American Brands, Inc., Brown & Williamson Tobacco Corporation.

Hugh R. Whiting, Jones Day, Reavis & Pogue, North Point, Cleveland, OH, Morton F. Daller, Tracy Canuso Nugent, Daller, Greenberg & Dietrich, Fort Washington, PA, for R.J. Reynolds Tobacco Company and RJR Nabisco, Inc.

Judy L. Leone, Dechert, Price & Rhoads, Philadelphia, PA, Thomas Finarelli & Gray, Philadelphia, PA, for B.A.T. Industries P.L.C.

Judy L. Leone, Robert C. Heim, Christine C. Levin, Ronni Ellen Fuchs, Dechert, Price & Rhoads, Philadelphia, PA, for Philip Morris, Inc.

Howard M. Klein, William J. O'Brien, Conrad, O'Brien, Gellman & Rohn, Philadelphia, PA, for Lorillard Tobacco Company and Loews Corporation.

Judy L. Leone, Dechert, Price, & Rhoads, Philadelphia, PA, Madeline M. Sherry, Stephen J. Imbriglia, Hecker, Brown, Sherry & Johnson, Philadelphia, PA, for United States Tobacco Company and Ust, Inc.

Joseph W. Fullem, Jr., Patrick W. Kittredge, Gary M. Marek, Kittredge, Donley, Elson, Fullem & Embick, Philadelphia, PA, for Council for Tobacco Research- U.S.A.

J. Kurt Straub, Abrahams, Lowenstein, Bushman & Kaufman, Philadelphia, PA, for Liggett Group, Liggett & Meyers, Inc. and Brooke Group, LTD.

Matthew L. Myers, National Center for Tobacco Free Kids, Washington, DC, for Respondents.

MEMORANDUM

NEWCOMER, District Judge.

Presently before this Court are plaintiffs' Motion for Class Certification, and defendants' response thereto, and plaintiffs' reply thereto, and the parties' post-hearing memoranda, and the parties' supplemental briefs, and the various exhibits in

support of the aforementioned.[1] In addition, a class certification hearing was held on March 6, 1997, during which the Court heard oral argument in support of and in opposition to plaintiffs' motion. For the following reasons, the Court denies plaintiffs' motion.

I. Introduction

This case follows hard and fast on the heels of the United States Court of Appeals for the Fifth Circuit's decertification of a nation-wide class of nicotine-addicted cigarette smokers. See Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir.1996). Subsequent to the Fifth Circuit's decertification in Castano, plaintiffs[2] filed a Complaint in state court against defendants.[3] On August 27, 1996, this action was removed from state court. Plaintiffs filed a "First Amended Complaint—Class Action" on December 2, 1996.

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[1] The American Heart Association, The American Cancer Society and The American Lung Association have filed an amici curiae brief.

[2] The plaintiffs are Steven R. Arch, William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Slazman, Edward J. Slivak and John Teagle. By letter of January 16, 1997, plaintiffs' counsel notified defendants that they were withdrawing Mr. Teagle as a named plaintiff in this action.

[3] The defendants are The American Tobacco Company, Inc., American Brands, Inc., R.J. Reynolds Tobacco Company, RJR Nabisco, Inc., Brown & Williamson Tobacco Corporation, Batus, Inc., Batus Holdings, Inc., B.A.T. Industries P.L.C., Philip Morris, Inc., Philip Morris Companies, Inc., Lorillard Tobacco Company, Inc., Lorillard, Inc., Loews Corporation, United States Tobacco Company, UST, Inc., The Tobacco Institute, Inc., The Council for Tobacco Research-U.S.A., Inc., Liggett Group, Inc., Liggett & Myers, Inc. and Brooke Group, Ltd.

Plaintiffs allege, in essence, that this action arises out of a common course of conduct on the part of defendants who have designed, researched, tested, manufactured, promoted and sold cigarettes to Pennsylvanians, including the plaintiffs herein, well aware that their products contain hazardous substances. Plaintiffs further allege that defendants have consistently and publicly denied that cigarettes are hazardous and addictive, while aware that the results of their own internal research demonstrate the addictive qualities of nicotine, and have accordingly manipulated that level of nicotine in their cigarettes with the intent and for the commercial purpose of creating and sustaining plaintiffs' addiction to their product.

As a result of defendants' conduct, plaintiffs assert that one million or more Pennsylvanians suffer from an addiction similar in severity to that suffered by users of heroin and cocaine. It is alleged that this addiction, in turn, continuously exposes these putative class members to other hazardous and toxic substances contained in defendants' products. Plaintiffs claim that this addiction is a condition that requires medical monitoring in the form of diagnostic and treatment services. Plaintiffs alleg e that through smoking they are continuously exposed to hazardous substances in cigarettes which places them at a substantially and measurably enhanced risk for specific smoking- related diseases. Plaintiffs maintain that medical monitoring is necessary to prevent, or reduce, diagnose and treat such diseases.

Plaintiffs' First Amended Complaint alleges the following causes of action: (1) medical monitoring; (2) intentional exposure to a hazardous substance; (3) negligence; and (4) strict products liability. Count five of plaintiffs' First Amended Complaint avers that defendants acted in concert or pursuant to a common design.

Plaintiffs seek the following relief: (1) certifying this action as a class action; (2) ordering defendants to implement a Court supervised or Court- approved program to medically monitor class members; (3) an award of punitive damages, to be used for common class-wide purposes, including, without limitation, medical research on the diseases that cigarettes cause and the treatment of those diseases, medical research into the addiction, public education campaigns about the health hazards of cigarettes smoking, and programs to assist class members in efforts to quit smoking; (4) awarding such other monetary and injunctive relief as the Court deems just and proper; and (5) awarding the costs of the suit.

Plaintiffs request certification of the following class:

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

Plaintiffs argue that the general requirements of Fed.R.Civ.P. 23(a)(1)-(4) are satisfied. Plaintiffs also contend that class certification is proper under Fed.R.Civ.P. 23(b)(3). In addition, plaintiffs asseverate that their medical monitoring claim can be properly certified under Fed.R.Civ.P. 23(b)(2). Alternatively, plaintiffs seek issue certification under Fed.R.Civ.P. 23(c)(4). Defendants, advancing a multi-pronged argument, oppose certification under any section of Rule 23.

II. Discussion

Federal Rule of Civil Procedure 23(c)(1) provides that class certification shall be determined "as soon as practicable after the commencement" of the action. Fed.R.Civ.P. 23(c)(1).

A determination of class certification does not focus on whether plaintiffs have stated a cause of action or will prevail on the merits but rather is limited exclusively to whether the requirements of Rule 23 have been satisfied. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732 (1974); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 252 (3d Cir.1975); Sala v. National R.R. Passenger Corp., 120 F.R.D. 494, 495 (E.D.Pa.1988). This determination is vested in the sound discretion of the trial court. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S.Ct. 2193, 2202, 68 L.Ed.2d 693 (1981); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 471-72 (5th Cir.1986). Since the court may amend an order granting class certification, In re School Asbestos Litigation, 789 F.2d 996, 1011 (3d Cir.1986), in a close case the court should rule, in favor of class certification. Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.1970).

To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met. Wetzel, 508 F.2d 239.

A. Rule 23(a) Requirements

Rule 23(a) provides that:

> One or more members of the class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a)(1)-(4).

The United States Court of Appeals for the Third Circuit has succinctly explained the purposes for which Rule 23(a) was created: "The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir.1994). The numerosity requirement addresses the concern of necessity, and the final three requisites are applied in order to determine "whether the class action can be maintained in a fair and efficient manner." Id.

1. Numerosity

The district court can make a common sense determination whether it would be difficult or inconvenient to join all class members as named parties under the particular circumstances of a case. See, e.g., Senter v. General Motors Corp., 532 F.2d 511, 523 (6th Cir.1976); Peil v. National Semiconductor Corp., 86 F.R.D. 357, 365 (E.D.Pa.1980). The Third Circuit has held that joinder is impracticable even where the class is composed of less than one hundred members. See Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir.1984).

In this case, the class consists of what is believed by plaintiffs to consist of more than one million residents of Pennsylvania.[4] In light of the vast numbers of persons who potentially fall within the class definition, defendants do not

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[4] In defendants' post-hearing memorandum, defendants place the number of potential class members at 2.8 million Pennsylvania residents. (Defs.' Post-Hr'g Mem. at 8). Despite this major discrepancy, it is obvious that this Court is dealing with a putative class of enormous proportions.

dispute that numerosity is satisfied, nor should they.[5] Thus, the Court finds that the numerosity prong of Rule 23(a) is satisfied.

2. Commonality

Before the Court determines whether plaintiffs have satisfied the commonality requirement, the Court must first address whether the standard for commonality has been modified by the Third Circuit's decision in Georgine v. Amchem Products, Inc., 83 F.3d 61 0 (3d. Cir.), cert. granted, — U.S. — —, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996).[6]

In Georgine, the Third Circuit recognized that some of its prior cases have "stated a very low threshold for commonality." Id. In Baby Neal, the Third Circuit stated that "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." Baby Neal, 43 F.3d at 56. And, in School Asbestos Litigation, 789 F.2d at 1010, the Third Circuit stated that "the 'threshold of commonality is not high.' " (citation omitted). In Georgine, the Third Circuit noted that Baby Neal involved a class action for injunctive relief, thus raising fewer individualized questions, Georgine, 83 F.3d at 627, and School Asbestos Litigation upheld the certification of a national class "on the ground that the case involved only property damages." Id. (citation omitted). The Third Circuit, in contrast to these

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[5] Defendants do however argue that the class is, in fact, so numerous that it is unmanageable and cannot be certified. The Court will address this argument below.

[6] Certiorari was granted only on the issue of whether a court may utilize a different standard in determining whether to certify a settlement class as opposed to a litigation class.

cases, held that "the commonality barrier is higher in a personal injury damages class action, like [Georgine], that seeks to resolve all issues, including noncommon issues, of liability and damages." Id.

Hedging on this statement, however, the Georgine court qualified this standard of commonality by stating that it was not holding that "this class fails the commonality requirement because the test of commonality is subsumed by the predominance requirement , which this class cannot conceivably meet." Id. The Georgine court explained that it was proceeding "cautiously here because establishing a high threshold for commonality might have repercussions for class actions very different from this case...." Id. It appears from these statements the Third Circuit was being ever so careful not to raise the threshold requirement of commonality in class actions except in the most extraordinary cases, such as Georgine.

In this case, the Court will not impose a higher threshold of commonality than the standard that was articulated in Baby Neal. Although this class action case possesses its own unique features, it is not Georgine. Georgine was a "personal injury damages class action," involving a settlement class, that was national in scope, where class members were being asked to compromise future claims without knowing what those claims might be. Most of these factors are not implicated by the facts in this case, thus the Court will not impose the higher threshold commonality requirement.

Under the Baby Neal standard, plaintiffs manifestly satisfy the commonality standard because there are many common questions of law and/or fact. Under Baby Neal, plaintiffs merely have to demonstrate that there is one common question of law or fact to satisfy the commonality requirement. Plaintiffs have alleged at least one common question. For example,

whether defendants have acted in concert or pursuant to a common design is one common question. Additionally, whether defendants' actions and omissions in the manufacture, promotion and sale of cigarettes to class members have been sufficiently egregious to warrant the imposition of punitive damages is another common question. Thus, the Court finds that the commonality standard is satisfied.[7]

3. Typicality

The third requirement, "typicality", focuses upon whether the claims of the class representatives are "typical of the claims ... of the class."[8] The typicality requirement "is intended to preclude certification of those cases where the legal theories of

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[7] Although the threshold requirement of commonality is met, the Court, as discussed below in Part II.C.1., finds that the "test of commonality is subsumed by the predominance requirement," which the putative class in this case "cannot conceivably meet." See Georgine, 83 F.3d at 627. This subsumption, however, occurs only as to plaintiff's request for class certification under 23(b)(3). Plaintiffs also seek class certification of their medical monitoring claim under Rule 23(b)(2). There is no subsumption of the commonality requirement under subsection (b)(2) because this subsection does not contain a predominance inquiry.

[8] "The concepts of commonality and typicality are broadly defined and tend to merge." Baby Neal, 43 F.3d at 56 (citation omitted). Both requirements attempt to "assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented." Id. (citing General Tel. Co. v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982)). Despite this similarity, commonality and typicality serve two distinct functions. " 'Commonality' like numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff...." Hassine v. Jeffes, 846 F.2d 169, 177 n. 4 (3d Cir.1988).

the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees." Baby Neal, 43 F.3d at 57. "Typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' " Id. (quoting Hassine, 846 F.2d at 177).

"The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." Georgine, 83 F.3d at 631 (citing Baby Neal, 43 F.3d at 57). A plaintiff's claims are considered typical where, in light of the facts and law applicable to the case, litigation of the named plaintiff's personal claims can reasonably be expected to advance the interests of absent class members. Scott v. University of Delaware, 601 F.2d 76, 84 (3d Cir.1979). Additionally, "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." Grasty v. Amalgamated Clothing & Textile Workers Union, 828 F.2d 123, 130 (3d Cir.1987); Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions § 3.15 (3d ed.1992).

Plaintiffs argue that the typicality requirement is easily satisfied in this case. Plaintiffs contend that "the named Plaintiffs' claims arise from the same course of conduct that has affected the class, they are members of the class as defined for purposes of certification, and they have requested remedies that will provide probable benefits to the entire class." (Pls.' Mot. Class Certification at 32).

Defendants rejoin that none of the named plaintiffs can satisfy the typicality requirement because typicality requires that the named plaintiffs "must be part of the class and possess the same interest and suffer the same injury as the class members." Falcon, 457 U.S. at 156, 102 S.Ct. at 2370. Defendants essentially argue that the breadth of plaintiffs' class definition and the individualized nature of plaintiffs' claims preclude any named plaintiff from having claims "typical" of the class as a whole. Defendants state that:

> The putative class embraces a myriad of differently situated plaintiffs, each of whom smoked different products (or different combination of products), in different quantities, during different periods of time. Class members may range from a person who has smoked three packs of cigarettes a day for the last thirty years to a person who has smoked two cigarettes a week for the last twelve months.

(Defs.' Resp. at 57). In advancing this argument, defendants rely heavily on the Third Circuit's articulation of the typicality requirement in the context of products liability and toxic torts suits. See Georgine, 83 F.3d at 631- 32.

In Georgine, the class consisted of all persons exposed to asbestos-containing products. No threshold level of exposure was required for class membership. Id. at 619 & n. 13. The named plaintiffs sought recovery on behalf of individuals who had already contracted asbestos-related diseases and individuals exposed to asbestos who had suffered no physical ailments but might, in the future, contract such conditions ("futures"). Id. at 619, 626. In reversing the district court's decision to certify the class, the Third Circuit held that differences between class members precluded a finding of typicality:

> [T]his class is a hodgepodge of factually as well as legally different plaintiffs.... [T]hese differences create problematic conflicts of interest among different members of the class. These problems lead us to hold that no set of representatives can be "typical" of this class. Even though the named plaintiffs include a fairly representative mix of futures and injured plaintiffs, the underlying lack of commonality and attendant conflicts necessarily destroy the possibility of typicality.

Id. at 632. Defendants argue that, in this case, factual differences among the putative class members make each plaintiff's claim atypical of the claims of other class members.

Defendants set forth the following factual differences in support of their argument. Cigarettes have changed in design and composition over the years. (Myracle Aff. ¶¶ 8-10; Townsend Aff. ¶¶ 6, 15-16; Jones Aff. ¶¶ 2-9). Changes between and among several hundreds of different brands and styles of cigarettes manufactured over the past several decades, (Myracle Aff. ¶¶ 14), differences in how long a plaintiff smoked, the volume smoked and what brand a particular plaintiff smoked and when also preclude fi nding "any individual typical of the class." Defendants further note that plaintiffs also allege that their claims relate to many different "toxic" and "hazardous substances" of which nicotine is only one. (First Amended Compl. ¶¶ 10, 13). Defendants summarize their argument by explaining that the substantial differences between the members of the putative class—most significantly in the areas of exposure and causation—make it impossible for any set of class representatives to be "typical" of the class as a whole.

Despite defendants' credible argument, the Court finds that defendants fall short of demonstrating that the typicality criterion of Rule 23(a) has not been satisfied. Plaintiffs allege that their claims arise from the same course of conduct undertaken by defendants. Specifically, plaintiffs have alleged that defendants have engaged in a concerted course of conduct whereby defendants have concealed their knowledge of nicotine's addictive properties and have purposefully and deliberately emphasized efforts to addict children and adolescents-resulting in an epidemic pediatric disease. In this process, plaintiffs allege that these consumers were involuntary subject to the cumulative, repetitive assault of the many different carcinogens contained in tobacco s moke. Although plaintiffs' claims may be factually different, plaintiffs have alleged a course of conduct by defendants that has given rise to plaintiffs' claims which are based upon the same legal theories, thus satisfying the typicality requirement of Rule 23(a)(3).

Indeed, the Third Circuit has held that "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of the legal theories." Baby Neal, 43 F.3d at 58 (citing De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir.1983)). In this case, there is a strong similarity between the legal theories being advanced by the named plaintiffs and the legal theories of the putative class members. Therefore the pronounced factual differences between each member of the putative class do not preclude a finding of typicality due to the fact that there is, at a minimum, "a strong similarity of legal theories."

Although defendants succeed in demonstrating that there exist many individualized questions which arise from the factual differences between the putative class members' individual claims, defendants fail to demonstrate that the "legal theories of the named plaintiffs potentially conflict with those of the absen-

tees...." See Baby Neal, 43 F.3d at 57. In other words, the Court concludes that "named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." See Georgine, 83 F.3d at 631 (citing Baby Neal, 43 F.3d at 57).

4. Adequacy of Representation

Finally, Rule 23(a)(4) requires that plaintiffs must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The Third Circuit has consistently relied on two factors:

> (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the Plaintiff must not have interests antagonistic to those of the class.

Weiss, 745 F.2d at 811 (quoting Wetzel, 508 F.2d at 247). Although defendants do not question the adequacy of plaintiffs' counsel, defendants seriously question the ability of named plaintiffs to adequately represent the putative class.

Pennsylvania law prohibits splitting a single claim into multiple legal actions. Kessler v. Old Guard Mut. Ins. Co., 391 Pa.Super. 175, 182-83, 570 A.2d 569, 573 (1990); Consolidation Coal Co. v. District 5, United Mine Workers of America, 336 Pa.Super. 354, 363, 485 A.2d 1118, 1122 (1984). In addition, failure to join in one action all causes of action which arise from the same transaction or occurrence may result in the waiver of the unmade claims. Hineline v. Stroudsburg Elec. Supply Co., Inc., 402 Pa.Super. 178, 181, 586 A.2d 455, 456, app. denied, 528 Pa. 630, 598 A.2d 284 (1991). Applying these legal principles, defendants contend that named plaintiffs, with

their amendment to the initial complaint, have abandoned many of the legal theories that they brought in their initial complaint. In so doing, defendants argue that named plaintiffs have patently demonstrated themselves to be inadequate class representatives because they risk waiving the damage claims of other class members.

In support of their argument defendants look to the case of Pearl v. Allied Corp., 102 F.R.D. 921 (E.D.Pa.1984). In Pearl, plaintiffs filed an amended complaint seeking medical monitoring and punitive damages but abandoning claims made in their initial complaint for present personal injury and breach of express warranty. The court found that this willingness to gerrymander claims precluded a finding that the named plaintiffs were fit to represent the class:

> [I]t appears that the plaintiffs' efforts to certify a class by abandoning some of the claims of their fellow class members have rendered then inadequate class representatives.... [C]lass members whose claims would be abandoned by the plaintiffs may find themselves precluded ... from asserting those claims in subsequent actions. For this reason, the plaintiffs cannot properly serve as class representatives.

Id. at 923-24. Accord Feinstein v. Firestone Tire and Rubber Co., 535 F.Supp. 595, 606 (S.D.N.Y.1982); see also Chmieleski v. City Prod. Corp., 71 F.R.D. 118, 147-49 (W.D.Mo.1976). Based on this case, defendants have tentatively demonstrated that named plaintiffs are inadequate representatives of the class. Indeed, named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class.

Before the Court concludes that the named plaintiffs have waived or abandoned any potential claims, the Court must closely exam the facts of this case through the prism of Pennsylvania law to determine whether there was an actual waiver of potential claims. Under Pennsylvania law, a plaintiff is not barred from initiating a subsequent lawsuit unless and until he or she has a compensable injury. See Manzi v. H.K. Porter Co., 402 Pa.Super. 595, 587 A.2d 778 (1991). In Manzi, plaintiff had developed pleural thickening, a condition caused by exposure to asbestos, but had not yet sustained any lung cancer. The Superior Court affirmed that his suit for pleural thickening did not preclude a subsequent suit should he develop lung cancer.

Applying this reasoning to the present case, the "monitoring" for diseases cannot logically be deemed to preclude class members from bringing future actions for diseases which class members may subsequently suffer from their exposure to cigarettes. In effect, the current class can be maintained and advanced on the current legal theories, excluding those theories which have been dropped with the amendment, without jeopardizing a class member's right to bring a subsequent action after he or she develops a d isease. Theoretically, Pennsylvania law allows these class members to bring subsequent suits to recover for the actual injury of disease, and these lawsuits may be grounded in the legal theories which were dropped from the original complaint in this action. Because Pennsylvania law permits such conduct, the Court rejects defendants' attack on the named plaintiffs' adequacy of representation.

Thus disposing of defendants' challenge to adequacy, the Court finds that plaintiffs have demonstrated that the threshold requisites of Rule 23(a)(1)-(4) have been satisfied. Clearing the Rule 23(a) hurdle, defendants must demonstrate that its putative class satisfies one of the sub-parts of Rule 23(b).

B. Rule 23(b)(2)

Plaintiffs contend that their medical monitoring claim is appropriate for class certification under Rule 23(b)(2).[9] Plaintiffs argue that because their medical monitoring cause of action sounds in equity, the Court may properly certify it under Fed.R.Civ.P. 23(b)(2). Defendants assert a panoply of reasons as to why this Court cannot permissibly certify plaintiffs' medical monitoring claim under Rule 23(b)(2). The Court addresses the issues raised seriatim.

As a threshold matter, this Court rejects defendants' argument that "medical monitoring is not a separate cause of action but rather a compensable item of damages available only under very narrow circumstances...." (Defs.' Resp. at 34). Defendants rely on the Pennsylvania Supreme Court's 1996 decision in Simmons v. Pacor, Inc., 543 Pa. 664, 674 A.2d 232 (1996). Defendants explain that although Simmons acknowledged In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829 (3d Cir.1990), cert. denied, 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991) ("Paoli I") (a pre-Simmons case in which the Third Circuit predicted that Pennsylvania would recognize a

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[9] Rule 23(b)(2) provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2).

separate cause of action for medical monitoring), Simmons did not adopt Paoli I but rather relied instead upon the Arizona Court of Appeals decision in Burns v. Jaquays Mining Corp., 156 Ariz. 375, 752 P.2d 28 (App.1988). In Burns, the court described medical monitoring as a compensable item of damages. Id. at 33. From Simmons' reliance on Burns, defendants extrapolate the conclusion that Pennsylvania does not recognize medical monitoring as a distinct cause of action but rather only as a compensable item of damages.

Defendants' argument is contrary to the plain language of Simmons. In explaining the nature of medical monitoring, the Simmons court stated that " 'injury in a medical monitoring claim is the cost of the medical care....' " Simmons, 674 A.2d at 240 n. 11 (citation omitted) (emphasis added). Simmons, which was decided by Judge Joyner who also sat by designation on the appellate panel in Redland Soccer Club, Inc. v. Department of Army of United States, 55 F.3d 827 (3d Cir.1995), teaches that Pennsylvania law recognizes medical monitoring as a separate and distinct cause of action. See Simmons, 674 A.2d at 240; see also Wagner v. Anzon, 453 Pa.Super. 619, 631 n. 7, 684 A.2d 570, 575 n. 7 (1996) ("Simmons recognized a claim for medical monitoring for plain tiffs"); In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 718 (3d Cir.1994) ("Paoli II"); Redland, 55 F.3d 827.

Although the Pennsylvania Supreme Court recognized a cause of action for medical monitoring, the Supreme Court did not describe the elements that comprise the cause of action. Simmons however cited the Third Circuit's opinion in Paoli I, where the Third Circuit articulated a four- element requirement for the maintenance of a medical monitoring claim. Under Paoli, the four elements are:

> 1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant;
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> 2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease;
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> 3. That increased risk makes periodic examinations reasonably necessary; and
>
> 4. Monitoring and testing procedures exists which make the early detection and treatment of the disease possible and beneficial.

Paoli I, 916 F.2d at 852.[10] Now that the Court has determined that medical monitoring is a distinct cause of action under Pennsylvania law, the Court turns its attention to whether this cause of action can be certified under Rule 23(b)(2).

Certification under Fed.R.Civ.P. 23(b)(2) is appropriate where equitable and injunctive relief is the sole or primary relief sought and "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." See Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 102 (1966); School Asbestos Litigation, 789 F.2d at 1008. Rule 23(b)(2) may not be invoked in a case requiring "significant individual liability or defense

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[10] Defendants argue that the Court must examine other factors, besides the four elements identified in the preceding text, before a successful claim for medical monitoring can be established. The Court will discuss these "other factors" in Part II.C.1. of this opinion.

issues which would require separate hearings for each class member in order to establish defendants' liability." Santiago v. City of Philadelphia, 72 F.R.D. 619, 627 (E.D.Pa.1976). As the Santiago court explained, "the court should be more hesitant in accepting a (b)(2) suit which contains significant individual issues than it would under subsection (b)(3)," because Rule 23(b)(2) actions do not permit opt outs. Id. at 628. With these principles in mind, the Court determines whether plaintiffs' medical monitoring claim can be certified.

Defendants argue that numerous courts, including the Third Circuit, have refused to view a medical monitoring claim as a request for injunctive relief and have therefore denied 23(b)(2) certification. Defendants contend that the Third Circuit has explicitly held that such a request for medical monitoring is a request for money damages. See Jaffee v. United States, 592 F.2d 712 (3d Cir.1979). In Jaffee, plaintiff sought an injunction ordering the defendants to provide medical monitoring; the Third Circuit rejected the argument:

> We agree that the request for prompt medical examinations and all medical care and necessary treatment, in fact, is a claim for money damages. A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money.... [Plaintiff] requests a traditional form of damages in tort—compensation for medical expenses to be incurred in the future.

Id. at 715. Accord School Asbestos Litigation, 789 F.2d at 1008 (affirming denial of (b)(2) class certification of claims for "mandatory injunctive relief," including claim for medical monitoring services, found by district court to be "essentially for damages").

Defendants note that other courts in this Circuit have also refused to certify medical monitoring claims under Rule 23(b)(2). See, e.g., Hurt v. Philadelphia Hous. Auth., 151 F.R.D. 555, 561 (E.D.Pa.1993); Abbent v. Eastman Kodak, No. 90-3436, slip op. (D.N.J. Aug. 28, 1992); Brown v. SEPTA, 1987 WL 9273 at *12 (E.D.Pa. Apr. 9, 1987); Villari v. Terminix Int'l Inc., 663 F.Supp. 727, 735 (E.D.Pa.1987); Linkous v. Medtronic, Inc., 1985 WL 2602, at *8 (E.D.Pa. Sept.4, 1985); In re Three Mile Island Litigation, 87 F.R.D. 433, 442 (M.D.Pa.1980); Greenberg v. McCabe, 453 F.Supp. 765, 773 (E.D.Pa.1978).

In the outside chance that these cases do not sufficiently persuade this Court as to the correctness of its position, defendants point the Court's attention to cases from both the Pennsylvania state courts and federal and state courts of other states. See, e.g., Simmons, 674 A.2d at 239; In re Kreamer Municipal Well Litigation, No. 336-1985 (Synder County Court of Common Pleas, Jan. 15, 1990), slip op. at 59 ("issues pertaining to damages ... shall be limited to institution of a medical monitoring program"); Daigle v. Shell Oil Co., 972 F.2d 1527, 1535 (10th Cir.1992); Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (4th Cir.1991); Thomas v. FAG Bearings Corp., Inc., 846 F.Supp. 1400 (W.D.Mo.1994); Cain v. Armstrong World Indus., 785 F.Supp. 1448, 1451-52 (S.D.Ala.1992); Gerardi v. Nuclear Util. Serv., 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004 (N.Y.Sup.1991).

From this plethora of cases, defendants broadly conclude that courts have refused to view a medical monitoring claim as a request for injunctive relief. Defendants appear to argue that a request for a medical monitoring fund is inherently a request for monetary damages. And as such, putative class plaintiffs could never request certification of a medical monitoring fund under Rule 23(b)(2).

Contrary to defendants' position, plaintiffs take the sanguine view that the creation of a court-supervised medical monitoring fund is properly within a court's equitable powers. (Pls.' Reply at 44). Plaintiffs contend that the Pennsylvania Supreme Court in Simmons implicitly recognized that the awarding of a medical monitoring fund may be appropriate injunctive relief. Plaintiffs contend that the Simmons court adopted the rationale of Burns, where the Arizona Court of Appeals held that the creation of a medical monitoring fund "to administer medical surveillance payments ... is a highly appropriate exercise of the Court's equitable powers." Burns, 752 P.2d at 32 (citation omitted).

Plaintiffs maintain that the Pennsylvania Supreme Court's implicit endorsement of Burns is consistent with many other state and federal court decisions, wherein these courts have concluded that if a plaintiff requests that a court- supervised medical monitoring fund be established, a Rule 23(b)(2) class action is appropriate. See, e.g., Shiffka v. Spencer Metal Processing Co., No. 32-E-1987 (Luzerne County Court of Common Pleas, Jan. 12, 1990); Yslava v. Hughes Aircraft Co., 845 F.Supp. 705 (D.Ariz.1993); Day v. NLO, Inc., 144 F.R.D. 330 (S.D.Ohio 1992); Cook v. Rockwell Int'l Corp., 778 F.Supp. 512 (D.Colo.1991); Barth v. Firestone Tire & Rubber Co., 661 F.Supp. 193 (N.D.Cal.1987). Relying on these cases, plaintiffs conclude that courts may certify a medical monitoring claim under Rule 23(b)(2) when plaintiff primarily seeks a court-supervised medical monitoring program; plaintiffs state that courts can grant such relief because a court-supervised medical monitoring program is a request for injunctive relief.

The Court finds that it may properly certify a medical monitoring claim under Rule 23(b)(2) when the plaintiffs seek such specific relief which can be properly characterized as invoking the court's equitable powers. See Day, 144 F.R.D. at

336; see also Fried v. Sungard Recovery Serv., Inc., 925 F.Supp. 372 (E.D.Pa.1996). In reaching this decision, the Court perforce rejects defendants' argument that a medical monitoring claim can never be characterized as injunctive.

The dispositive factor that must be assessed to determine whether a medical monitoring claim can be certified as a Rule 23(b)(2) class is-what type of relief do plaintiffs actually seek. If plaintiffs seek relief that is a disguised request for compensatory damages, then the medical monitoring claim can only be characterized as a claim for monetary damages. In contrast, if plaintiffs seek the establishment of a court-supervised medical monitoring program through which the class members will receive periodic examinations, then plaintiffs' medical monitoring claim can be properly characterized as claim seeking injunctive relief.

In Day, Judge Spiegel cogently articulates the fine distinction between a medical monitoring claim that seeks monetary relief in the form of compensatory damages and a medical monitoring claim that seeks injunctive relief in the form of a court-supervised medical monitoring program. Judge Spiegel explains:

> Relief in the form of medical monitoring may be by a number of means. First, a court may simply order a defendant to pay a plaintiff a certain sum of money. The plaintiff may or may not choose to use that money to have his medical condition monitored. Second, a court may order the defendants to pay the plaintiffs' medical expenses directly so that a plaintiff may be monitored by the physician of his choice. Neither of these forms of relief constitute injunctive relief as required by Rule 23(b)(2).
>
> However, a court may also establish an elaborate

> medical monitoring program of its own, managed by court-appointed court-supervised trustees, pursuant to which a plaintiff is monitored by particular physicians and the medical data produced is utilized for group studies. In this situation, a defendant, of course, would finance the program as well as being required by the Court to address issues as they develop during the program administration. Under these circumstances, the relief constitutes injunctive relief as required by Rule 23(b)(2).

Day, 144 F.R.D. at 335-36;[11] see also Fried, 925 F.Supp. at 374 (implying that under medical monitoring case law, a creation of a medical monitoring program would be equitable in nature). Based on Judge Spiegel's insightful distinction, it is apparent that relief requested under a medical monitoring claim can be either injunctive or equitable in nature.

To determine whether the named plaintiffs in this case seek equitable relief under their medical monitoring claim, plaintiffs' specific request for relief under this claim must be closely scrutinized. Plaintiffs seek the establishment of a court-supervised program through which the class members would

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[11] Defendants suggest that Judge Spiegel has changed his view about medical monitoring in light of his recent opinion in In re Telectronics Pacing Systems, Inc., 168 F.R.D. 203 (S.D.Ohio 1996). In Telectronics, Judge Spiegel noted in dicta that since Day was decided, several states have permitted recovery of damages for medical monitoring as part of the relief. Id. at 219 n. 17. In Pennsylvania, however, medical monitoring is an independent cause of action, not a compensable item of damages. Thus, Judge Spiegel's dicta does not call into question the continued validity of Day in those jurisdictions, including Pennsylvania, where medical monitoring is an independent cause of action.

undergo periodic medical examinations in order to promote the early detection of diseases caused by smoking. This portion of plaintiffs' request is the paradigmatic request for injunctive relief under a medical monitoring claim.

Nevertheless, plaintiffs' request for relief under their medical monitoring claim extends far beyond just these periodic examinations. Plaintiffs seek not only a fund for the detection of disease but also a fund for its treatment. (Pls.' Interrog. Resp. No. 36; First Amended Complaint ¶ 23). This request for treatment drastically alters the nature of the relief requested by plaintiffs under the medical monitoring claim. In this regard, plaintiffs, claim is in all respects identical to a traditional damage claim for personal injury. The only difference is that plaintiffs seek to filter payment for medical treatment through an intermediary. Jaffee is clear on this point. Plaintiffs cannot transform a legal claim into an equitable one merely by using a fund as a repository for money damages. Jaffee, 592 F.2d at 715.

Compounding their problems with respect to the monetary nature of the relief requested, plaintiffs also seek to have the Court establish smoking cessation programs in which the class members would be permitted to enroll. Plaintiffs partially claim that they have been injured by their addiction to defendants' products which causes them to be involuntarily exposed to numerous "hazardous substances" and places them at an increased risk of developing the diseases caused by smoking. To overcome this addiction, and thus reduce their chances of contracting smoking-related diseases, plaintiffs specifically request to be enrolled in smoking cessation programs as treatment for their addiction. These smoking cessation programs are also just another form of treatment, and as such, it is merely a disguised request for future damages. Plaintiffs cannot transform a legal claim into an equitable one merely by using a fund as a conduit for money damages.

It is evident that the substantial majority of relief requested is monetary in nature. Plaintiffs request for actual medical monitoring examinations is but a small portion of the relief requested. Indeed, at the class certification hearing, plaintiffs' counsel stated that the yearly medical examinations would cost approximately $2,000 a year per class member. While this sum is not insignificant, it pales in comparison to the amount of monies that would have to be paid out by defendants to treat the addiction and diseases. Plaintiffs' medical monitoring claim is merely a thinly disguised claim for future damages. As such, plaintiffs' medical monitoring claim cannot be certified under Rule 23(b)(2).

Additionally, plaintiffs' medical monitoring claim cannot be certified under Rule 23(b)(2) because the overwhelming majority of relief sought by plaintiffs in their entire complaint is monetary in nature. The advisory committee notes accompanying Rule 23(b)(2) state that this rule "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." School Asbestos Litigation, 789 F.2d at 1008 (citation omitted). In this regard, courts have refused to certify a(b)(2) class action "where the 'realities of the litigation' demonstrate that suit has been brought primarily for money damages...." Christiana Mortgage v. Delaware Mortgage Bankers Ass'n, 136 F.R.D. 372, 381-82 (D.Del.1991) (citing School Asbestos Litigation, 789 F.2d at 1008).

Although plaintiffs' request for periodic medical examinations pursuant to a court-supervised program could be properly viewed as "injunctive" relief, the majority of relief sought by plaintiffs is compensatory. As plaintiffs' counsel made clear at the class certification hearing, the largest part of plaintiffs' claim is not their request for monitoring, but the request for compensatory relief-money for having purchased cigarettes (estimated at up to $350,000 per smoker) and punitive damages (conserva-

tively estimated at a one- to-one ratio as being up to $350,000). (Transcript at 40, 43). These numbers categorically demonstrate that the majority of relief sought by plaintiffs is monetary in nature. As such, a class cannot be properly certified under Rule 23(b)(2) but must satisfy the requirements of Rule 23(b)(3).

C. Rule 23(b)(3)

Rule 23(b)(3) provides:

> (b) Class actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to the other available methods for fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation and the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

Plaintiffs submit that all of their claims can be properly certified under Rule 23(b)(3). Defendants vigorously oppose

such certification, arguing that plaintiffs cannot satisfy the predominance or superiority prongs of 23(b)(3).[12]

1. Predominance

Under Rule 23(b)(3), a court must determine whether "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members...." Fed.R.Civ.P. 23(b)(3). In order for the commons issues to "predominate," common issues must constitute a significant part of the individual cases. See Jenkins, 782 F.2d 468.

A court must satisfy itself that common issues predominate over individual issues because such a finding assures that the purposes of Rule 23(b)(3) are furthered. "Subdivision 23(b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 102 (1966). It is only when predominance exists that a court can be sure that economies can be achieved by means of the class action. Id.

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[12] Plaintiffs point to both Broin v. Philip Morris Companies, Inc., 641 So.2d 888 (Fla.Ct.App.3d Dist.1994), rev. denied, 654 So.2d 919 (Fla.1995) and R.J. Reynolds Tobacco Co. v.Engle, 672 So.2d 39 (Fla.Ct.App.3d Dist.1996), rev. denied, 682 So.2d 1100 (Fla.1996), as persuasive authority for the certification of a class in this case under Rule 23(b)(3). The Court finds that these cases offer no real assistance to its determination of Rule 23(b)(3) certification. First, the cases are factually and legally distinguishable from this case. Second, both opinions are devoid of a thorough analysis of the requirements which must be satisfied before a class is certified.

After a thorough review of both the common and individual issues that are implicated by the facts of this case, the Court concludes that the common issues do not predominate over the individual issues. Plaintiffs contend that there are overriding common issues about defendants' behavior:

> specifically, whether the tobacco companies have, over the past decades, engaged in intentional, reckless conduct to control and manipulate nicotine levels, in order deliberately to addict smokers, particularly young people, and to intentionally, recklessly, or negligently expose people to hazardous substances.

(Pls.' Mot. Class Certification at 19). Plaintiffs argue that the common issues about the tobacco companies' historic and present conduct predominate over any individual issues, thus making this action "classically appropriate for class certification." While defendants' conduct raises many common issues, the Court cannot agree with plaintiffs' assessment that this case is "classically appropriate for class certification."

Upon closer examination of the issues raised herein, it becomes evident that the individual issues raised not only predominate over the common issues but overwhelm the common issues. A class action in this case would not "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." With this stated, the Court will specifically explain how the individual issues preclude any possible 23(b)(3) certification.

Although the Supreme Court has warned that a court considering class certification may not conduct a preliminary

inquiry into the merits of a suit, see Eisen, 417 U.S. at 177-78, 94 S.Ct. at 2152-53, a court may look beyond the confines of the pleading to determine whether the requirements of Rule 23 have been satisfied. Castano, 84 F.3d at 744.[13] "Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." Id. (Manual for Complex Litigation § 30.11). An examination of the claims, defenses, relevant facts and applicable substantive law leads to the inescapable conclusion that individual issues pervade this entire action.

Plaintiffs' request for class certification under Rule 23(b)(3) is contrary to the weight of authority in mass tort cases. Both the Georgine and Castano courts, which were mass tort cases, refused to certify classes under Rule 23(b)(3). In reasoning fully applicable to this case, Judge Becker only recently stated, it is "difficult to fathom" how common issues could predominate in any mass tort products case:

> [T]he class members' claims vary widely in character. Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods ... Each has a different history of cigarette smoking, a

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[13] See also Falcon, 457 U.S. at 160, 102 S.Ct. at 2372 ("Sometimes the issues are plain enough from the pleading ... and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (178) (explaining that "the class determination generally involves consideration that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'").

> factor that complicates the causation inquiry.
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> * * *
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> These factual differences translate into significant legal differences. Difference in the amount of exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

Georgine, 83 F.3d at 626-27. The Fifth Circuit echoed those concerns when it rejected certification of claims virtually identical to those raised in this case. Castano, 84 F.3d at 743.[14]

Additionally, the advisory committee notes to Rule 23(b)(3) instruct us that:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and

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[14] See also In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.1995) (decertifying product liability class action); In re American Medical Sys., Inc., 75 F.3d 1069, 1084 (6th Cir.1996) (reversing certification of products liability class action against makers of penile implants—"economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff"); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir.1988) ("In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy").

> defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Id. at 745 n. 19 (citing Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. at 103).[15] The reasons that underlie this overwhelming weight of authority against certification of mass tort cases are equally applicable here.

Plaintiffs' negligence and strict liability theories raise numerous individual issues that predominate over any class-wide issues. The elements of these particular claims and attendant affirmative defenses raise innumerable individual issues which overwhelm the class-wide issues.

Plaintiffs' entire action centers around addiction and whether the plaintiffs are addicted. Plaintiffs allege that defendants have consistently and publicly denied that cigarettes are hazardous and addictive, while aware that the results of their own internal research demonstrate the addictive qualities of nicotine, and have accordingly manipulated that level of nicotine in their cigarettes with the intent and for the commercial purpose of creating and sustaining plaintiffs' addiction to their product. Plaintiffs continue by claiming that "these consumers were involuntarily subject to the cumulative, repetitive assault of the

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[15] Although plaintiffs have argued that Professor Charles Allen Wright, a member of the Advisory Committee, has now repudiated this passage, he has opined that certification of what purports to be a class action on behalf of everyone who "has ever been 'addicted' to nicotine" would be a "Frankenstein's monster." Castano, 84 F.3d at 745 n. 19 (citing Letter of Dec. 22, 1994, to N. Reid Neureiter).

many different carcinogens contained in tobacco smoke: for Defendants, a foreseeable, and foreseen consequence of addiction that Defendants, in the name of profit, deliberately inflicted upon the class." (Pls.' Reply Br. at 8-9) (emphasis added).

As an essential part of their claim, plaintiffs allege that their exposure to many different carcinogens was "involuntary" because they were addicted. In other words, addiction has robbed plaintiffs of the voluntary choice to decide whether they would expose themselves to the carcinogens in tobacco smoke.

Additionally, plaintiffs highlight the importance of addiction as part of their theory when they argue that the affirmative defense of assumption of risk is not available to defendants. Plaintiffs contend that defendants should be barred from relying on their "personal choice" argument because information has allegedly arisen that indicates that tobacco companies have knowingly used the "addictive power of nicotine" to "hook" young smokers to become "life-long" smokers. (Defs.' Post-Hr'g Mem. at 9). Plaintiffs submit that these smokers were robbed of "free choice" due to addiction. Thus, plaintiffs' theory of liability relies heavily on their being able to prove that the class members are addicted. The question which is thus posited at this point is not whether plaintiffs can prove addiction, but rather how they will prove addiction, i.e., can they prove it on a class-wide basis as opposed to individual inquiries.

Plaintiffs' own expert Dr. Burns recognizes that the assessment of addiction is an inherently individual inquiry. (Burns Dep. at 64, 268)[16] Based on this statement, defendants

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[16] Dr. Hughes, plaintiffs' expert in the Castano litigation, also testified in Castano that addiction is an individual inquiry that involves an analysis of "the person, and the circumstances in the person's life." (Hughes Dep. at 87-88, 201-203, 209-212, 316-317).

argue that class certification under these circumstances would require a mini-hearing on the merits of each individual's case to determine injury. See Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D.Pa.1995). Importantly, the Court finds that nowhere in plaintiffs' voluminous submissions do they actually refute that addiction is an inherently individual inquiry. Instead, plaintiffs offer a solution to this massive problem of proving addiction on an individual basis. Plaintiffs propose that once the general issue as to whether cigarettes can cause addiction[17] is resolved, the issue as to whether each and every class member is addicted can be resolved by having them answer a questionnaire, consisting of six simple questions. Defendants rejoin that this questionnaire cannot by itself determine whether a person is nicotine dependent.[18]

The Court finds that even if the questionnaire was used to determine nicotine dependence, defendants would be permitted to cross-examine each and every class member as to their alleged dependence. Plaintiffs admittedly acknowledge that the plan they propose would be, at most, a prima facie indication of

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[17] The Court will use the terms "addiction" and "nicotine dependence" interchangeably.

[18] The questionnaire is called the Fagerstrom Assessment for Nicotine Dependence. Plaintiffs submit that a reliable determination as to whether a potential class member is nicotine dependent can be made if the potential class member scores within a certain range on this test. In contrast to this simple nicotine dependence test, defendants cite to the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) ("DSM-IV"). DSM-IV contains a section on "substance dependence", which requires individual inquiries and clinical assessments. A thorough reading of DSM-IV's section on substance dependence would lead a neutral observer to believe that whether a person has a substance dependence can only be determined by an individual inquiry.

addiction. Plaintiffs' own experts concede that addiction is necessarily an individual inquiry. To refute plaintiffs' prima facie case, defendants would be permitted to cross-examine each individual about his specific choices, decisions and behavior, and defendants would be entitled to offer expert testimony about each person's specific circumstances and diagnosis. Based on this one individual issue, class certification under Rule 23(b)(3) is not appropriate because the cross-examination of each class member in a trial would be impossible.[19]

To succeed on their products liability and negligence claims, plaintiffs will also have to prove "causation," which the Court finds is not capable of determination on a class-wide basis in this case. Resolution of the "general causation" question of whether cigarettes are capable of being addictive "is not common under Rule 23(a)(2)." Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 677 (N.D.Ohio 1995). Unless it is proven that cigarettes always cause or never cause addiction, "the resolution of the general c ausation question accomplishes nothing for any individual plaintiff." Id.; see also In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 164 (2d Cir.1987) (the "relevant question is not whether Agent Orange has the capacity to cause harm," but rather the "highly individualistic" question of whether "it did cause harm and to whom").

As explained previously, plaintiffs do not actually refute the proposition that a finding of addiction entails an individualistic inquiry; instead, they suggest that this individualistic inquiry can be proven by a questionnaire, consisting of six

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[19] If the examination necessary for the jury to decide each of these individual issues took only one hour per person, and if this class is composed of one million people, then the "trial" of this case would take (with testimony being heard 8 hours a day, 50 weeks per year) approximately 250 years.

questions. The use, however, of this questionnaire will not obviate the need for cross-examination by defendants as demonstrated above. If plaintiffs are unable to prove that cigarettes always cause addiction (a contention that plaintiffs do not advance), the Court is faced with the impossible reality of trying a case in which one million persons would have to be cross-examined as to causation.

Plaintiffs cannot satisfy the "causation" element of these claims by proving that all cigarettes can potentially cause the user to become addicted.[20] This is a general causation issue. The resolution of this "general causation question" would accomplish nothing for any of the individual plaintiffs. See Kurczi, 160 F.R.D. at 677. Indeed, the jury would still be required to determine for each class member whether he or she is addicted to cigarettes, and, if so, whether defendants (and which defendant) caused that addiction. With respect to causation, the Court finds that this issue is highly individualized and does not lend itself to Rule 23(b)(2) certification.[21]

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[20] In their papers, plaintiffs argue that they will produce experts who will testify that all cigarettes contain nicotine in sufficient quantities to cause addiction/nicotine dependence. Importantly, plaintiffs do not contend that cigarettes will cause addiction/nicotine dependence to each and every individual who smokes.

[21] In addition, the Court also concludes that the use of questionnaires to establish the elements of causation and injury—without cross-examination or rebuttal evidence—would violate defendants' due process rights. See In re Fibreboard Corp., 893 F.2d 706, 710 (5th Cir.1990) (procedure whereby claims of individual class members are not adjudicated in individual jury trials implicates defendants' right to due process); In re Masonite Corp. Hardboard Siding Prod. Liab. Litig., 170 F.R.D. 417, 425 (E.D.La.1997) (defendants "cannot receive a fair trial without a process which permits a thorough and discrete presentation of [their] defenses").

To establish their strict products liability claim, plaintiffs will be required to prove a defect in defendants, products. This inquiry is also highly individualized. Defendants manufactured hundreds of different types of cigarettes over the years and have even made changes within each brand. In their First Amended Complaint, plaintiffs allege that defendants' cigarettes contain numerous "hazardous substances," and that defendants have "intentionally manipulated" the levels of nicotine and "other toxic substances." (First Amended Compl. ¶¶ 10, 13). The different types of unspecified defects—which may be present in some cigarettes but not in others—make proof of a defect a non-common issue. As a result, each class member will have to establish that t he type of cigarettes he or she smoked contained a defect at the time he or she smoked them. See In re American Medical Systems, 75 F.3d at 1081 (commonality not established where the plaintiffs' "claims of strict liability ... will differ upon the model and the year it was issued"). The need to prove a defect in defendants' products raises another individual issue.

Plaintiffs claim that they can prove a common defect on a class-wide basis for all of defendants' products. Plaintiffs argue that all of defendants' products are inherently defective because they contain sufficient levels of nicotine to cause addiction and other hazardous substances. Thus, plaintiffs will attempt to establish a common defect by showing that this combination exists in all of the cigarettes sold by defendants. Nonetheless, the possibility that plaintiffs' common defect theory will fail and that the class will be splintered into various subclasses—creating manageability concerns—"weighs against a finding of predominance of common issues." Harding v. Tambrands, 165 F.R.D. 623, 630 (D.Kan.1996) (refusing to certify strict liability class where it is possible that the plaintiffs' common defect theory could fail).

With respect to plaintiffs' medical monitoring claim, the Court also finds that individual issues predominate over common issues.[22] In the Paoli II decision, the Third Circuit added an inherently individual factor: "whether a reasonable physician would prescribe for [the plaintiff] a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure." Paoli II, 35 F.3d at 788 n. 53. This factor alone would require an individual, plaintiff-by-plaintiff comparison of the medical monitoring program allegedly warranted by smoking with the monitoring program required if the plaintiff had no t smoked:

> [A] plaintiff must prove that by reason of exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff.

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[22] Defendants argue that each class member would have to prove "a demonstrable physical consequence" to be entitled to medical monitoring. (Defs.' Resp. at 34-35). Plaintiffs rejoin that Pennsylvania law does not require a plaintiff to show "a demonstrable physical consequence." Because the Court finds that plaintiffs' medical monitoring claim raises a host of innumerable individual questions without examining whether a plaintiff need show "a demonstrable physical consequence," the Court reserves ruling as to whether this element is part of a medical monitoring claim.

Paoli II, 35 F.3d at 788 (quoting Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 980 (Utah 1993)).

For class members with a minimal smoking history, the level of risk may be outweighed by the burdens and costs of monitoring procedures. Plaintiffs' expert, Dr. Burns, acknowledged that the type of monitoring that would be appropriate would require individual analysis of factors such as the amount and duration of smoking. (Burns Dep. at 113, 118-120). Medical necessity thus widely fluctuates among class members. It appears that these issues cannot be resolved on a class-wide basis.

The diseases for which plaintiffs seek monitoring and treatment are multifactorial diseases with a wide variety of risk factors in addition to smoking and are seen in many individuals who have never smoked. These multiple risk factors include occupationa l or environmental exposure to asbestos, toxic chemicals or radiation, diet, alcohol consumption, heredity and past medical history. For example, plaintiff Barnes has hypertension, high cholesterol, diabetes and an extensive family history of heart disease. The fact that he smokes would not require any additional monitoring for heart disease not already warranted by the multiple, significant risk factors for heart disease he already has.[23] Therefore, the-review of each individual's medical and family history and exposure to other

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[23] Dr. Burns concurs with this point: for individuals who already have significant risk factors for diseases that warrant medical monitoring, smoking would not require additional diagnostic tests. (Burns Dep. at 178- 81, 240). Dr. Burns states that the "evaluation and screening would stay the same, and the advice [to quit smoking] would change." Id. As stated above, advice to quit smoking is not "monitoring," but treatment.

risk factors that Paoli requires is an obviously individual inquiry. Plaintiffs offer no suggestion as to how defendants would be able to inquire into each and every plaintiffs' past medical and family history on a class-wide basis.

In addition, to obtain medical monitoring damages, plaintiffs would have to show that the increased risk makes periodic medical examinations "reasonably necessary." Simmons, 674 A.2d at 239; Paoli I, 916 F.2d at 852. Again, this determination varies from class member to class member depending upon many of the same factors described above. Finally, even if early detection procedures do exist, the plaintiff must still prove that such procedures are appropriate in his individual case. " '[I]f a reasonable physician would not prescribe [such procedures] for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed.' " Paoli II, 35 F.3d at 788 (quoting Hansen, 858 P.2d at 980). In this case, the appropriateness of screening procedures would vary from plaintiff to plaintiff. For some plaintiffs, because of the health risks or excessive costs involved with the particular procedure, the physician would not recommend the medical monitoring procedure. Consequently, this issue is highly individualized and militates against Rule 23(b)(3) certification.

The facts and claims of this case implicate a number of affirmative defenses, all of which raise individual issues that preclude a Rule 23(b)(3) certification. The Third Circuit noted in Georgine :

> [T]he alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of risk, contributory negligence and the statute of limita-

> tions) may depend on facts peculiar to each plaintiff's case.

Georgine, 83 F.3d at 628. As mandated by Georgine, in making a class certification decision, a district court must examine whether the validity of an affirmative defense depends on "facts peculiar to each plaintiff's case." If a jury would have to look at facts peculiar to each plaintiff's case when assessing the affirmative defenses, an inherently individual inquiry is required. This individual inquiry most definitely militates against Rule 23(b)(3) certification.

In this case, defendants raise numerous affirmative defenses. Under Pennsylvania law, assumption of risk has been found to be a viable defense against strict products liability claims. See Surace v. Caterpillar, Inc., 111 F.3d 1039, 1054-55 (3d Cir.1997) (citing McCown v. International Harvester Co., 463 Pa. 13, 15, 342 A.2d 381, 382 (1975)). To prevail on an assumption of risk theory, a defendant must show that the plaintiff knowingly and voluntarily proceeded to use the product or encounter a known da nger. Id. Assumption of risk is an inherently individual question, turning as it does upon the subjective knowledge and behavior of individual plaintiffs. Childers v. Power Line Equip. Rentals, Inc., 452 Pa.Super. 94, 107, 681 A.2d 201, 208 (1996). Under these principles, each class member's knowledge about the allegedly "addictive" or injurious nature of cigarettes and their decision to begin or continue to smoke in the face of that knowledge is therefore relevant to a determination of assumption of risk.

Additionally, the class member's knowledge would also be relevant to a determination of comparative fault, which is a defense to the negligence claims. 42 Pa. Cons.Stat. Ann. § 7102. The Court could not possibly bifurcate the issue of defendants' negligence and plaintiffs' comparative negligence. As the Court

in Castano noted, the Seventh Amendment compels that the same jury that hears the evidence of defendants' alleged negligence also hear the comparative negligence evidence with regard to each and every class member. See Castano, 84 F.3d at 750-51; see also Rhone-Poulenc, 51 F.3d at 1303. Thus, the comparative negligence analysis raises such individual issues of immense proportions that Rule 23(b)(3) certification is obviously inappropriate.

Defendants also raise a statute of limitations defense, which is not a common issue. Plaintiff's claims are subject to Pennsylvania's two year statute of limitations. See 42 Pa. Cons.Stat. Ann. § 5524. Under the discovery rule, the cause of action accrues, and the statute of limitations begins to run, when the plaintiff knows, or reasonably should know, that he has been injured. Cathcart v. Keene Indus. Insulation, 324 Pa.Super. 123, 135-36, 471 A.2d 493, 500 (1984). Once a plaintiff discovers the injury, he is charged with a duty to exercise diligence in investigating the claim. Pennsylvania courts have not hesitated to bar claims under the discovery rule where parties have not exercised reasonable diligence in ascertaining the cause of injury. Cochran v. GAF Corp., 542 Pa. 210, 216, 666 A.2d 245, 248-49 (1995). Here, too, plaintiffs' testimony underscores the individual testimony that would be required at a trial.

Defendants also raise the affirmative defense of "consent" to plaintiffs' claim of intentional exposure to a hazardous substance.[24] The defense of consent is very similar to the defense

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[24] Defendants argue that Pennsylvania does not recognize an independent cause of action for "intentional exposure to a hazardous substance" in a products liability case. (Defs.' Supplemental Br. at 10). Plaintiffs contend that Pennsylvania does recognize such an action. The Court reserves decision on this issue because it is not necessary for the disposition of this instant motion.

of assumption of risk. W. Page Keeton, Prosser and Keeton on Torts 112 (4th ed.1984). Thus this defense would necessarily require an examination of the facts peculiar to each and every plaintiff; a highly individual issue which militates against certification under Rule 23(b)(3).

Plaintiffs, in response to defendants' "affirmative defenses" argument, set forth two arguments as to why these affirmative defenses do not necessarily lead to the predominance of individual issues. First, plaintiffs suggest that the jury will determine whether the named plaintiffs' claims are barred by affirmative defenses and that those results will bind the remainder of the class "as permitted by law." (Interrog.Resp. No. 42). Such a procedure raises serious fairness and due process concerns for plaintiffs and defendants alike. Absent class members would be greatly prejudiced by a process whereby their claims could be barred because the class representatives were found to have been contributorily negligent or to have assumed a known risk. The Court finds that this proposal is not a practicable or legitimate solution.

Plaintiffs main argument however is that defendants should be barred as a matter of law from asserting these affirmative defenses. Plaintiffs argue that defendants, due to the facts and circumstances of this case, should be barred from raising the defenses of statute of limitations, consent or assumption of risk. Whether defendants should be barred from raising these defenses necessarily requires a fact-intensive analysis by the Court.

For example, plaintiffs argue that defendants cannot rely on assumption of risk because all of the defendants have denied that cigarettes cause addiction and are carcinogenic. As such, plaintiffs argue that they cannot "assume risks" that the cigarette industry has continually denied exist. Defendants, of course, oppose this contention by plaintiffs. The Court however cannot

properly dispose of this issue at the present time because it does not have a full evidentiary record before it. Indeed, these issues are usually raised by way of summary judgment after the parties have completed discovery. A ruling at this juncture in the litigation would be based on an incomplete record and would necessarily prejudice the parties. Thus, the Court refrains from m aking such a determination.

Moreover, a ruling as to whether an affirmative defense is valid or not does not necessarily advance plaintiffs' position with respect to predominance. For example, the Court may decide that defendants have produced sufficient evidence with respect to its affirmative defenses which would necessitate sending this issue to the jury. Under this scenario, it is obvious that defendants would be permitted to examine each and every class member as to the issues surrounding its affirmative defenses. And even if the Court ruled that defendants were barred from raising one or all of its affirmative defenses, there are numerous remaining individual issues which predominate over the common issues.

In sum, the Court finds that the individual issues implicated by the facts and circumstances of this case predominate over the common issues. Thus the putative class fails the predominance prong of Rule 23(b)(3).

2. Superiority

Rule 23(b)(3) provides for certification of a class if the court finds that a class action is the superior method to other available methods for a fair and efficient adjudication of the case. Fed.R.Civ.P. 23(b)(3). In making this superiority determination, the Court should consider the four criteria of Rule 23(b)(3) which address fairness and efficiency.

In addition, a finding of superiority requires:

> (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method. The interests that should be taken into account include those of the judicial system, the putative class, the instant plaintiffs and defendant and their attorneys, and the general public.

Lake v. First Nationwide Bank, 156 F.R.D. 615, 625 (E.D.Pa.1994) (citations omitted). As the Third Circuit has recently explained, Rule 23(b)(3) asks us to balance, in terms of fairness and efficiency, the merits of a class action against those of "alternative available methods" of adjudication. Georgine, 83 F.3d at 632. Because this class suffers major problems in both efficiency and fairness, the Court finds that plaintiffs' putative class independently fails the superiority requirement of Rule 23(b)(3).

As in Georgine, in terms of efficiency, a class of this "magnitude and complexity" could not be tried. See id. The reality of this litigation is that there are simply too many individual issues and class members to try this case efficiently. The manageability problems which would be encountered in litigating and trying this case are staggering. Plaintiffs simply do not offer a workable plan as to how this litigation would be tried with respect to the numerous individual issues.

Plaintiffs' "Suggested Trial Phase I" simply does not adequately address the manageability problems that ominously loom in this case. In their reply brief, plaintiffs suggest a trial

plan that would address the common liability and common damages issue. However, this trial plan proposed by plaintiffs fails to address how the individual issues of addiction, causation and affirmative defenses can be determined on a class-wide basis consistent with the rights of the parties.

Each of these issues would be disputed and therefore would be decided by the jury. Defendants argue that many of these issues can be proven on a class-wide basis through the use of claim forms, statistical random sampling, depositions, expert opinion and court-appointed special masters. (Interrog.Resp.Nos.4, 16, 19, 21, 22, 27, 32-34, 37, 38, 30). However, many of the methods proposed by plaintiffs would abrogate the constitutional rights of defendants. As previously discussed, the use of a questionnaire to determine addiction would be violative of defendants' due process right to a fair trial.

Plaintiffs contend that if the Court were to permit damages to class members, such damages can be determined and awarded on a class-wide basis. Plaintiffs state that proof of such damages can be presented through expert statistical evidence. In making this argument, plaintiffs point to the case of Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir.1996).

The class in Hilao was composed of roughly 10,000 persons who had been tortured, summarily executed or "disappeared" by the regime of Marcos. After a liability trial the court permitted damages to be extrapolated to the class as a whole on the basis of 137 claims that were randomly selected and tried. Defendants argued that the method used to compute damages violated their due process rights because the jury did not consider the individual questions of degree of injury, proximate cause, etc. The Court noted that "degree of injury" would have affected the computation of damages in that case but defendants could not

raise this issue because they waived any challenge to the computation of damages.

Applying the reasoning of Hilao to this case, the Court finds that plaintiffs would not be permitted to use expert statistical evidence to prove damages. Unlike Hilao, defendants in this case do not waive any challenge to the computation of damages. Thus, the "degree of injury," which was not at issue in Hilao, will be critically important here. The "degree of injury" which each and every class member suffered would clearly be relevant to the computation of damages and would necessarily entail an individual inquiry. As the Sixth Circuit has stated, "[a]lthough many common issues of fact and law will be capable of resolution on a group basis, individual particularized damages still must be proved on an individual basis." Sterling, 855 F.2d at 1200. Therefore, plaintiffs' proposed expert statistical evidence will not assuage the manageability problems raised in this case.

Another factor weighing heavily against class certification is the substantial risk that in order to make this case manageable, the Court will be required to bifurcate issues in violation of the Seventh Amendment. This putative class action is littered with individual issues, such as injury, causation, comparative negligence, affirmative defenses and damages. In order to handle these issues, plaintiffs implicitly suggest that a "second" jury or juries hear these individual issues. Such a proposal would surely violate defendants' constitutional rights.

The Seventh Amendment entitles parties to have fact issues decided by one jury and ensures that a second jury will not re-examine those facts.[25] Castano, 84 F.3d at 750. The "limita-

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[25] "[N]o fact tried by jury, shall be otherwise re-examined in any Court of the United States...." U.S. Const. amend. VII.

tion on the use of bifurcation is a recognition of the fact that inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact." Id. A right which exists in this case and precludes the Court from bifurcating any issue that would allow two juries to pass over the same issue twice.

The Castano court cogently describes why the issue of comparative negligence could never be bifurcated:

> Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct. At a bare minimum, a second jury will rehear evidence of the defendant's conduct. There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of the first jury.

Id. at 751 (citations omitted). Because the risk of reevaluation would be so high, it cannot be said with any logic that class certification is superior to individual adjudications in this case.

Another compelling factor that militates against a finding of superiority is that there does not exist "a prior track record of trials from which [this Court] can draw the information necessary to make the ... superiority analysis required by Rule 23." See id. at 747. The Castano court stated that "the certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication." Id. As in Castano, this Court concludes that the lack of a prior track record of trials in these types of cases makes

it practically impossible to draw information necessary to make the superiority analysis.

Plaintiffs argue that the "immature tort" theory should not apply in this case because they proceed on well-established causes of action. As an initial matter, the Court questions plaintiffs' characterization with respect to the maturity of the causes of action on which they proceed. Plaintiffs' medical monitoring claim and putative intentional exposure to a hazardous substance claim are relatively new causes of action if you consider the history of the development of tort law.[26] Based just on the relative "maturity" of these particular causes of action, the Court could determine that these torts are immature. The concept of the immature tort however goes far beyond this simplistic analysis.

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[26] A recent, timely article in The National Law Journal spoke to this issue:

> The path to acceptance for any cause of action is generally long and arduous.
>
> The process can begin with a new law, a new application of an old law or the development of a new theory, but each cause faces daunting obstacles, particularly in gaining the willingness of judges to allow the cause to proceed.
>
> Truly new torts are rarely accepted. The now-common tort of insurance bad faith was one of few established this century. The first lawsuits against insurance coverage date back more than 300 years.... But it wasn't until 1974, ... that California became the first state to establish case law delineating bad faith in denials as a separate tort. Margaret Cronin Fisk, Looking for a New Cause of Action?, Nat'l L. J., May 19, 1997, at A1.

In the context of Rule 23(b)(3), the immature tort theory has a much broader meaning then its mere name would suggest. The immature tort can refer to a new cause of action, or an old cause of action applied to a new situation. See Id. at 737; see also Recent Case, Class Certification of Mass Torts—Fifth Circuit Decertifies Nationwide Tobacco Class : Castano v. American Tobacco Co., 110 Harv. L.Rev. 977, 980 (1997) (opining on the wide variety of meanings that "immature tort" may encompass). For example, in Castano, the cause of action was not novel; indeed, the Castano plaintiffs proceeded on the ordinary claim that a fraudulent failure to disclose material information resulted in injury to plaintiffs.

The immature nature of the Castano plaintiffs' claim arose out of the fact that the plaintiffs were applying old causes of action to a new situation. The new situation was what the Castano court called the "addiction-as-injury" theory of liability. In Castano, plaintiffs were claiming that defendants' conduct caused them to become addicted to cigarettes, thus exposing them to the enhanced risk of contracting smoking-related diseases. This theory of liability was "novel". Indeed, at the time of Castano, no United States Court had ever tried a tobacco suit based on plaintiffs' theory of liability. Because of the novelty of this theory and the lack of prior track record, the court was unable to draw on any information to make its superiority analysis.

In this case, plaintiffs allege that they proceed on a different theory of liability. However, a close reading of plaintiffs' amended complaint indicates that plaintiffs proceed on almost the same theory of liability as did the Castano plaintiffs. The plaintiffs' theory of liability directly relies on their being able to prove that cigarettes are addictive, that the class members are addicted, that the defendants knew that the cigarettes were addictive, that despite this knowledge defendants targeted chil-

dren with advertising for the sole purpose of addicting them, and that defendants' actions were undertaken with the full knowledge that cigarettes contained carcinogens which caused disease. In sum, addiction is central to plaintiffs' theory of liability.

Applying the immature tort theory to this case, the Court finds that plaintiffs cannot demonstrate superiority in this case. The superiority analysis requires a balancing of the merits of the class action against those "alternative available methods," namely individual trials in this case. See Georgine, 83 F.3d at 632. Any attempt to make a superiority determination in the absence of a prior track record of individual trials is necessarily based on speculation. See Castano, 84 F.3d at 748.[27]

Here, plaintiffs submit that class action treatment is superior to the thousands of individual trials that the courts will be inundated with if a class is not certified. (Pls.' Post-Hr'g Mem. at 8; Pls.' Reply Br. at 51). In essence, plaintiffs contend that precious judicial resources will be preserved if this case is certified as a class action. Plaintiffs' argument is based on pure speculation. As the Castano court noted, "[n]ot every mass tort is asbestos, and not every mass tort will result in some judicial crises." Id. at 747. The judicial crisis to which plaintiffs allude is only theoretical at this point in time.

Additionally, a major rationale for a finding of

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[27] To the extent that Castano court concludes that a finding of superiority can never be reached when the case implicates an immature tort, this Court rejects Castano as persuasive authority. In some cases where the immature tort theory is involved, plaintiffs could still establish superiority by way of analogy to cases which are similar to that particular case. A court could properly rely on these analogous cases to determine if class action treatment is superior to individual trials.

superiority—judicial efficiency—is not present in this case. See Sterling, 855 F.2d at 1196 ("The procedural device of Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense."). Whether a class action would be more efficient than individual actions goes directly to the heart of the immature tort doctrine.

Even assuming that the courts will be exposed to many more of these types of cigarette cases, "a conclusion that certification will save judicial resources is premature at this stage of the litigation." Castano, 84 F.3d at 749. Plaintiffs argue that a class action is superior because if plaintiffs are required to try their cases individually, the issues of defendants' knowledge, intent, or reckless disregard, and defendants' financial capacity, will have to litigated many of thousands of times. This is mere speculation. In the individual trials, it may turn out that the common issues of defendants' conduct is a minor part of each trial, thus producing empirical evidence that common issues are not actually a significant part of these cases. Moreover, what plaintiffs fail to note is that there are also many individual issues involved here which may require thousands of individual mini-trials, even if the case was certified as class action. Thus, there may be no savings but rather a diminution of judicial resources, and thus a reduction in judicial efficiency.

If there existed a prior track record of trials in these types of cases, the Court would be able to make a more accurate determination as to judicial efficiency. The Court could refer to the actual issues and problems that arise in these cases, instead of being forced to speculate as to what these issues and problems may be. Additionally, individual trials in these cases may winnow out many of the individual issues that are now before this Court. Id. at 749-50 (finding that in these individual actions, the validity of certain defenses and causes of actions can be

determined). After individual trials are conducted in these cases, the courts will have the necessary information to make a thoughtful and logical superiority determination. At this time, however, plaintiffs cannot produce enough information to establish the superiority of a class action.

Finally, one of the main reasons for finding superiority in a class action— the existence of a negative value suit—is absent in this case. See id. at 748. Accord Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809, 105 S.Ct. 2965, 2973, 86 L.Ed.2d 628 (1985); see also Rhone-Poulenc, 51 F.3d at 1299. At the certification hearing, plaintiffs' counsel claimed that each class member would be entitled to restitution and punitive damages. The award amount could total approximately $750,000 based just on these restitution and punitive damages. This figure could potentially climb even higher if compensatory damages and the costs of medical monitoring were factored into the equation. Based on these potential damages, the Court cannot conclude that individual lawsuits by the putative class members would be negative value suits.[28]

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[28] At the hearing, plaintiffs argued that these suits were negative value suits because medical monitoring examinations would only cost approximately $2000 per year per person. However, plaintiffs undermine this argument by conceding that they are also seeking restitution and punitive damages (the plaintiffs also actually seek compensatory damages in the form of treatment pursuant to the medical monitoring program).

Plaintiffs also advance another duplicitous argument. On the one hand, plaintiffs argue that they cannot possibly litigate these medical monitoring claims against defendants due to defendants' overwhelming financial position. Plaintiffs claim that it is "David versus Goliath." This argument however is a tad disingenuous. First, in making their superiority argument, plaintiffs contend that the courts

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Based on the foregoing reasons, the Court cannot possibly conclude that a class action in this case would be superior to other available alternative methods.

D. Rule 23(c)(4)

This Court may certify issues under Fed.R. Civ. P. 23(c)(4)(A) which provides as follows:

> (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues.

Fed.R.Civ.P. 23(c)(4)(A).

In the alternative, plaintiffs request that the Court certify one or more of the common questions set forth in their brief as common issues for class adjudication pursuant to Rule 23(c)(4)(A). Defendants oppose such a certification.

Before a district court may certify common issues pursuant to (c)(4), the court must first find that a cause of action, as whole, satisfies the predominance requirement of (b)(3). Castano, 84 F.3d at 745 n. 21 (citing In re N.D. Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856 (9th Cir.1982)). After the

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[28] (continued)

will be flooded with thousands of these suits. An admission that these cases are financially worth pursuing in the courts. Second, plaintiffs are represented by a nation-wide consortium of more than sixty well-financed law firms. There thus really does not appear to be a significant financial disparity in the parties' ability to finance these putative litigations. Thus, what this Court and other courts similarly situated are faced with is "Goliath versus Goliath."

court determines that (b)(3) has been satisfied as to the whole cause of action, then the court may use (c)(4) as "a housekeeping rule ... to sever common issues for trial." Id. At this point in time, plaintiffs have not proven that subsection (c)(4) can be used to sever common issues because they have not established that their causes of action independently satisfy the predominance requirement. Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues.

III. Conclusion

Today's decision is not in the slightest respect a comment on the merits of plaintiffs' claims; the resolution of the merits of this litigation is reserved for another day. Instead, today's decision is merely a recognition that a class action cannot be properly certified in any case unless the requisites of Rule 23 are satisfied. Additionally, today's decision is also an acknowledgment that the substantive rights of the parties cannot be compromised in any respect by the imprudent certification of a class action.

Accordingly, for the foregoing reasons, plaintiffs' motion for class certification is denied.

An appropriate Order follows.

ORDER

AND NOW, this 3rd day of June, 1997, upon consideration of plaintiffs' Motion for Class Certification, and defendants' response thereto, and plaintiffs' reply thereto, and the parties' post-hearing memoranda, and the parties' supplemental briefs, and the various exhibits in support of the aforementioned,

and oral argument heard in open court at the class certification hearing held on March 6, 1997, it is hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED.